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OF THE
ROMAN CIVIL LAW.

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A MANUAL

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OF THE

ROMAN CIVIL LAW

ARRANGED AFTER THE ANALYSIS OF
DR HALLIFAX.

BY

GEORGE LEAPINGWELL, LL.D.

BARRISTER AT LAW.

"When the fundamental conceptions of Roman Law are thoroughly realized, the rest is mastered with surprising facility."

DR MAIR, *Cambridge Essays*, 1886.

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TO

PATRICK COLQUHOUN, LL.D. G.C.S. K.C.M. &c. &c.

MEMBER OF COUNCIL OF THE SUPREME COURT OF APPEAL
OF THE IONIAN ISLANDS,

AS A TOKEN OF SINCERE REGARD

THESE PAGES

ARE INSCRIBED.

PREFACE.

THE advance made in public opinion in the course of the last twenty-five years as to the importance of a sound legal education, recognized by the Inns of Court, and also by the University of Cambridge, has caused it to be acknowledged that, without becoming a professed Civilian, no one can presume to call himself an accomplished lawyer unless he have some acquaintance with the Roman Jurisprudence. Nothing has done more to deter the student from entering upon the pursuit of the Roman Law, however superficially, than the want of some book which presents a plain and comprehensive view of that vast subject. The following pages are an attempt to effect this. The Summary of the Roman Civil Law by Dr Colquhoun is the most valuable work on the subject in the English language, but it is too diffuse for the general student, and serves rather as a book of reference. The present volume professes to be arranged according to the Syllabus of Dr Hallifax. This has been done as far as practicable. No better arrangement perhaps could be found; but the discovery of the Institutes of Gaius subsequent to the time when

Dr Hallifax wrote makes it inconvenient to adhere to his arrangement throughout, and almost impossible beyond the third book of the Institutes. The division into four books according to the Institutes has been observed. The definitions, the clearness and terseness of which form one of the peculiar characteristics of the Roman Law, and the importance of which cannot be overrated by the student, have been taken whenever practicable from the Institutes and Digest ; in default of these, those found in the Elements of Heineccius have been adopted without hesitation, as being clear and correct. The author has studied to avoid a large book ; and if the reader wish to go beyond a mere superficial knowledge of its contents, he should consult the references generally, and particularly those of the Corpus Juris, and the Institutes of Gaius.

The author is conscious that mistakes and inaccuracies will be found which have escaped his observation ; but he is not without the hope that, imperfect as his work may be, it may afford the student some substantial assistance.

G. L.

CAMBRIDGE,

March 3, 1859.

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- Ulp. Fr. Ulpiani *Fragmenta*.
- Vin. Com. Vinnius' Commentaries.
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ROMAN CIVIL LAW.

BOOK I.

OF THE RIGHTS OF PERSONS.

CHAPTER I.

Of the Roman Civil and Canon Laws, and their authority in England.

I. LAW, in its ordinary signification, denotes the rules of human action or conduct. Human nature cannot be considered apart from law. The mere savage is not without the element of laws. His authority over his wife and children, and his property in his rude implements of hunting and weapons of defence, represent the germs of the Civil law of the most complicated societies, and of the wealthiest communities. A system of law existing among a people presupposes an historical period of gradual political advancement and civilization. By comparing systems of law, the Jus Civile of different communities, we come to jurisprudence, which is defined by Ulpian to be "divinarum atque humanarum rerum notitia, justī atque injustī scientia¹." Jurisprudence is a science; it teaches principles, and must be carefully distinguished from legislation and codification, which are arts.

CHAP.
I.

Jurisprudence.

It is impossible to study the principles of law without reference to some particular system, and the Roman law as contained in the *Corpus Juris Civilis* of Justinian, from the circumstance of its being complete, i. e. as it is to-day so we find it to-morrow, without the changes and additions which are going on in modern codes, is the most convenient, as well as the best, which we can use. Before we proceed to examine the contents of the *Corpus Juris Civilis*, or to study the principles

¹ D. I. I. 10. 2.

BOOK
I.

which it contains, it is necessary to trace briefly the history of the Roman law from its earliest period, and to understand its various changes and developments from the foundation of Rome to the time of Justinian. Modern jurists divide the Roman law historically into four periods. 1. From the foundation of the city to the Twelve Tables. 2. From the Twelve Tables to Augustus. 3. From Augustus to Constantine. 4. From Constantine to Justinian; but the arrangement of Bach¹ is followed here as the most clear and comprehensive. He makes nine periods from the foundation of Rome to the fall of the Byzantine Empire inclusive.

*Periods of
the Roman
law.*

1. Rome under the kings.
2. From the expulsion of the kings to the compilation of the Twelve Tables; these together constitute the *Jurisprudentia antiqua*.
3. From the compilation of the Twelve Tables to Augustus; called the *Jurisprudentia media*.
4. From Augustus to Hadrian.
5. From Hadrian to Constantine.
6. From Constantine to Theodosius the younger.
7. From Theodosius to Justinian.
8. From Justinian to Basilius Macedo.
9. From Basilius Macedo to the fall of Constantinople in the year 1453.

*Sources of
the Roman
law.*

The sources of the Roman law are twofold, I. General. 2. Particular, or technical.

The general sources comprise those circumstances and events which led to its growth and early development, and which will only require a cursory notice.

General.

First. The original founders of the city of Rome settled upon the Tiber among the Etruscans, and others who had their own laws and

¹ *Historia Jurisprudentiæ Romanæ.*

customs. When these submitted to the Roman rule, and became incorporated as one people, some part of their usages would necessarily be retained and adopted. This is the case in all nations of a like origin. As an example, the common law of England has arisen from a combination of Saxon, Danish and Norman usages, though it may now be difficult to trace them with anything like precision.

CHAP.
I.

Secondly. As early as the Twelve Tables a free testamentary disposition was allowed to the Roman citizen; hence the law of Wills and Codicils.

Thirdly. The commercial energies of the Romans were soon developed; hence the early establishment and maturity of the law of Contracts.

Fourthly. Whenever a territory was conquered they took one third for the purposes of colonizing, and gave back the rest; this established the laws of Mensuration.

Fifthly. The subdivision of property, wherein the purchaser had conveyed to him certain rights without which the property would have been comparatively useless; from this sprung the Roman *Servitudes*, or easements.

Sixthly. When the two thirds of the conquered lands were returned to the inhabitants, the *decumæ vectigal*, the yearly tax of the tenth, was imposed. The collection of this tax was not undertaken by the Government, but it was let out to the publicani who bid for it. They were farmers of the public revenue. This led to the law of Capital and Partnerships.

Lastly. The Marine laws. These date from the time of the first Punic war, when Rome began to be a maritime power, v.c. 490.

The technical sources of the Roman law will require the student's careful attention. I shall not do much more than enumerate them here in their chronological order, as they will be more fully explained in the next chapter.

Technical.

BOOK
I.*Leges
Regiæ.*

First, we have the *Leges Regiæ*, or the *Jus Civile Papyrianum*, said to have been collected by Sextus Papyrius, Pontifex Maximus. This is supposed to have contained a digest of the laws passed under the kings. They were perhaps partly incorporated into the Twelve Tables; but after the establishment of consular power they probably became nearly obsolete.

*Twelve
Tables.*

Secondly, we come to the laws of the Twelve Tables, which are, in fact, the starting-point of Roman jurisprudence; and as they owe their origin to a revolution in the state, which was gradually emerging from its infancy, and ascending to civilization and power, it is necessary to understand the principal circumstances which led to their establishment.

In the year 292 u.c. there commenced a political struggle between the patricians and plebeians, the origin of which, like many other similar struggles which the world has since witnessed, was the clashing of class interests. The object of the plebeians, who had now become rich and powerful, was to place themselves as nearly as they could on an equal footing with the patricians; to curb the arbitrary power of the consuls; and to frame a national code for all classes of Romans without distinction¹. Though the *Jus Papyrianum* was reduced to writing, this probably did not apply to the penal law. Where law was oral decisions were left to the discretion of the consuls; the fines imposed by them on the patricians were limited to a small sum, whilst upon the plebeians they were wholly indefinite and discretionary. No bail was allowed to the plebeians, "which may be inferred from the jest of Appius the Decemvir, who called the gaol the plebeians' lodging²;" whereas before the time of the Twelve Tables all patricians could keep out of prison by giving bail, and thus were secured from personal punishment, whatever

¹ Nieb. Vol. II. 378.² Liv. III. 57.

offences they might commit¹. These iniquities, together with many of a minor description which swelled the general discontent, induced Terentilius Harsa, the tribune, to bring forward a law for their removal in the year 292 U.C. Then followed ten years of political turmoil, when each party becoming weary of the contest, and each probably conceding something to the other, three deputies were sent to Athens to examine the laws of Solon, and the legal institutions of Greece. Their work was much facilitated by the assistance of one Hermodorus, a learned Ephesian, who had for some time resided in Rome². The deputies returned from their mission in the year 302 U.C. when it was agreed that ten patricians should be appointed to revise and settle the laws. These were the *Decemviri legibus scribendis* invested with extraordinary powers: the consuls, the tribunes, and all other magistrates were suspended; the government of the state was committed to them, and from their decision there was no appeal. At the end of the year 302 ten tables were completed; as these, however, did not comprise all that was considered necessary, the Decemvirate was continued for another year, when two additional tables were produced, completing the twelve, which, we may conclude from the title of *Lex* prefixed to them, received the sanction of the people. We must here guard ourselves from the error of supposing that the Decemviri acted in the character of legislators. As far as we can collect from history, their province did not extend beyond the task of the selection and codification of such existing laws and customs as in their judgment it was most expedient to adopt. The Twelve Tables were finally committed to writing, and set up in some public place for the information of the people; whether in the *Ærarium*, or in the Forum, and whether written on brass, copper, or ivory, is of no

¹ Nieb. Vol. II. 284.

² D. I. 2. 2. 4.

BOOK
I.

importance in our inquiry; and may safely be left to the deep research of the German commentators. Here the Roman jurisprudence begins: the complaint of the uncertainty and obscurity of the laws could no longer be urged; they became plain to all who could read, and the Roman school-boys learned them as their tasks. Parts of the Decemviral laws have survived: the reader may consult Bach's *History*, p. 14, and the second volume of Haubold's *Institutes*.

It can scarcely be doubted that the plebeians at first intended to accomplish an entire equalization of civil rights and privileges. In this they failed, for the Twelve Tables produced no amalgamation of grades. This appears evident from the fact that it was not till more than eighty years afterwards that the first plebeian consul was elected¹.

*Actiones
Legis.*

The Twelve Tables having been settled, it followed that every legal proceeding must thenceforth be governed by them. But the Decemviri had determined nothing with respect to the forms which the suitor must observe. This had to be settled by the Jurisprudentes. They therefore framed the *actiones legis* which were the forms necessary to be observed, and if not observed the suitor had no *locus standi* in court; his action was abated, and he had to begin anew. The *actiones legis* are well explained by Heineccius as "*certi exercendi juris ritus, certæ verborum conceptiones et formulæ, quibus neglectis, susceptum quodvis civile negotium irritum habebatur*."² The patrician Jurisprudentes having established these necessary formulæ, all knowledge of them centered in themselves: they alone knew how and when each action should be brought, for they also kept secret the *dies fasti, nefasti* and *intercisi*.

Jus Flavianum.

In the year 450 u.c. one Flavius, who was clerk to Appius Claudius Cæcus, a patrician lawyer, copied and published his master's book

¹ Haub. II. 34.² Hein. *Ant. proem.* 6.

of *Actiones*, i.e. forms and precedents. Though a most dishonest act, it was a great boon to the public, as it put an end to the monopoly of the patricians, and from that time plebeian lawyers began to exist. It is called the *Jus Flavianum*. CHAP.
I.

The patrician Jurisprudentes immediately remodelled the *Actiones*, so as again to thwart the plebeians: these amended forms were published by Sextus Ælius in the year 552 u.c. This is the *Jus Ælianum*. *Jus Ælianum.*

It must be carefully noted that these were not additions to the law itself, but the necessary forms used by lawyers in the practice of it.

The real additions made to the law during the *media jurisprudentia*, that is, from the Twelve Tables to the reign of Augustus, were:

1. The *Responsa Prudentum*,—the legal opinions given by the Jurisprudentes in answer to cases stated by their clients, collected and arranged according to the subjects of which they treated. *Responsa Prudentum.*

2. The *Jus honorarium*, which was the law arising from the rules of the Prætor's court, afterwards called the *Edictum perpetuum Juliani*, which will be explained in the next chapter. *Jus honorarium.*

3. The *Senatus Consulta*,—decrees of the Senate. *Senatus Consulta.*

In the year 723 u.c. Augustus became emperor, and having had absolute power conferred on him by the *Lex regia*, the *Placita Principum*, or *Constitutiones Imperatorum*, began to be exercised by him, and thenceforth were continued by all succeeding emperors. He also conferred the *auctoritas respondendi* upon certain of the most distinguished jurists, decreeing that their *responsa* should be considered as law, and as such should be recognised by the courts. This however did not interfere with the *Jus respondendi* of the jurists in general. *Placita Principum.*
Auctoritas Prudentum.

In the year 131 A.D. the Emperor Hadrian ordered Salvius Julianus, who was then Prætor,

BOOK
I.*Edictum
Perpetuum
Salvii
Juliani.**Institutes
of Gaius,
A.D. 169.**Codices
Gregoriani
et Hermo-
geniani,
A.D. 306.**Codex The-
odosianus.*

to collect and arrange the whole Jus Honorarium, which consisted of the edicts of the Prætors and Ediles, called afterwards the *Edictum perpetuum Salvii Juliani*. The term *perpetuum* means the continuous unbroken series of edicts which had been preserved from the earliest times¹.

Gaius, a distinguished lawyer, flourished during the reign of the Antonines. He compiled the *Institutes of the Roman Law* in four books. Haubold assigns the year 169 A.D. to this work². Though it was known to have existed, it was considered as lost, and was only brought to light in the year 1816 by Professor Niebuhr, who discovered it in the library of the chapter at Verona. The *Institutes of Gaius* preceding those of Justinian by more than 350 years, and being composed in the most palmy days of the Roman law, enable us to compare the two periods, and to understand much that was before obscure.

More than three hundred years had elapsed between the establishment of the Empire by Augustus and the reign of Constantine the Great: during that time the *Constitutiones Imperatorum* had swelled to a vast bulk; and in his reign these were arranged and codified by Gregorianus. Another code was also published about the same time by Hermogenianus. Nothing can be stated with certainty respecting these codes. Bach³ considers they were compiled for the private use of the parties whose names they bear, and afterwards received the Imperial sanction. They are said to have contained the constitutions of all the heathen emperors from Augustus to Constantine the Great.

In the year A.D. 438 the Emperor Theodosius the younger employed eight of the most distinguished Jurisperiti to compile a code, revising those of Gregorianus and Hermogenianus, and adding the constitutions of the Christian emperors down

¹ See post, ch. 2.² Vol. II. 63.³ Bach, 284.

to his own time. This work consisted of sixteen books, eleven of which only now remain entire¹. CHAP.
I.

The Novells of Theodosius were such constitutions as he issued after his Code was completed, and were probably afterwards incorporated with the Code of Justinian. *Novells of Theodosius.*

Justinian became emperor, succeeding his maternal uncle Justinus I. in the year A.D. 527. He resolved upon a revision of the whole Roman law, a confused mass, presenting a wide field of doubt and uncertainty. Tribonianus, a distinguished lawyer, was selected by the Emperor to conduct this arduous and important work². In the month of April, A.D. 528, having nine other jurists associated with him, he commenced the revision of the codes of the imperial constitutions, viz. those of Gregorianus, Hermogenianus and Theodosius. The object was to reject every thing that had become obsolete or contradictory, and to consolidate without altering the law. They performed their work with extraordinary, and, apparently, unnecessary haste, for in April, 529, they produced a code in twelve books which was confirmed by Justinian. It was found afterwards to abound with inaccuracies, and was cancelled. *Accession of Justinian.*

Codex Justinianus.

In December, 530, seventeen lawyers, of whom Tribonianus was the chief, commenced the compilation of the Digest or Pandects from the works of those jurists whose writings were considered authoritative law. It is said that this work was condensed from 2000 different treatises. Ten years were allowed for the performance, but it was finished in December, A.D. 533³. It is comprised in fifty books, which are divided into titles, laws, and paragraphs. Each law has the name of the author prefixed from whose work it was extracted. *Digest.*

Previous to the publication of the Digest the Institutes or *Elementa juris* were compiled by *Institutes.*

¹ Warnk. *Com.* Vol. I. 32.

² Gibbon, c. 44.

³ Gibbon, c. 44.

BOOK I. Tribonianus assisted by Theophilus and Dorotheus. This work is an abridgement of the whole Roman law, and was intended for academical instruction. The compilers took the Institutes of Gaius¹ as a model, following his arrangement, and in many instances copying his very words. It was published together with the Digest. It is divided into four books, which are again subdivided into titles and paragraphs.

Codex repetita prælectionis.

The commissioners then again turned their attention to the Code which, inaccurate from the haste in which it had at first been compiled, had become more so from the number of constitutions issued by Justinian during the three years occupied in the compilation of the Digest. It therefore underwent an entire revision, and was republished 15 November, A.D. 534, under the title of the *Codex repetita prælectionis*. Between this period and his death, which took place in the year 565, Justinian issued 168 new constitutions—*Novellæ constitutiones* or Novells. These changed or modified the law on many points as settled in the revised Code.

Novellæ.

Justinian died in the year 565. His laws were compiled for the Eastern Empire, where the language of the people was Greek, consequently they would soon have become useless had they not been translated into the vernacular tongue. This appears to have been done during Justinian's lifetime, and with his authority. Theophilus published a Greek paraphrase of the Institutes as early as the year A.D. 534².

We may assume that the Eastern Empire continued to be governed by Justinian's laws for 300 years after his death. In the year A.D. 886 Basilus Macedo became emperor, and he soon after ordered the compilation of a work from the Institutes, Digest, and Code of Justinian, introducing such additions and changes as had arisen from the

¹ See ante, p. 10.

² Haub. II. 95.

BOOK
I.

THE CANON LAW.

*Canon
law.*

THE origin of the Canon law may be referred to the earliest period of Christianity. The early Christians were an isolated body, and as a Church was formed a system of social government based upon Christian principles was constituted, which was necessarily confined within the Church, for out of it there could be no executive, its rules and regulations not being recognised by the temporal power. It therefore became necessary that complaints arising from the infraction of ecclesiastical discipline and doctrine should be decided and arranged within the bosom of the Church itself. Thus a system of ecclesiastical polity was early developed in the Church. These ecclesiastical laws and regulations were framed and administered by the presbyter or bishop by virtue of his office and influence. Thus by degrees arose what is now called the Canon law. The separate unities of Church and State were established; each began to subsist apart from the other with an independent system of government. The Emperor Justinian admits the separate existence of the two powers in the commencement of the sixth Novell, addressed to Epiphanius, archbishop of Constantinople, where he recognises the *Sacerdotium et Imperium: illud quidem divinis ministrans, hoc autem humanis præsiciens*.

At first the jurisdiction of the ecclesiastical authorities was limited to matters of religion; afterwards the spiritual tribunals gradually enlarged their pretensions, and assumed the cognizance of all causes touching an ecclesiastical matter, or person. Thus the Canon law gradually encroached upon the province of the civil magistrate, and ultimately assumed the most arrogant pretensions.

The arrangement and codification of the Civil law by Justinian without doubt suggested the same course with respect to the Canon law, which was ultimately reduced to the *Corpus Juris Canonici* after Justinian's model. This consists of three parts:

CHAP.
I.

1. The Decretum. 2. The Decretals. 3. The Extravagants of John XXII.

1. The Decretum is a collection of Ecclesiastical constitutions made by the Pope, or by the Pope and Cardinals at no man's suit—*mero motu*. They were given *Urbi et Orbi*. These were collected by Gratian, a monk of Bologna, about the year 1140. They were afterwards revised, and received the formal recognition of Pope Gregory XIII. in the year 1580: these correspond with the Digest of Justinian.

Decretum.

2. The Decretals are canonical epistles written by the Pope, or by the Pope and Cardinals, for determining some matter in controversy; they constitute the second part of the *Corpus Juris Canonici*, and correspond with Justinian's Code. To these must be added the Extravagants of John XXII. which hold the place of the Novells. The title Extravagants was originally given to the Decretals, as being the first collection that wandered beyond the *Decretum*, and was afterwards confined to the *Decretals* of John XXII. With the sanction of Paul IV. John Lancellott compiled the Institutes of the Canon law in four books. We thus have the *Corpus Juris Canonici* consisting of

Decretals.

Extravagants of
John
XXII.

1. Institutes in four books.
2. Decretum like the Digest.
3. Decretals like the Code.
4. Extravagants of John XXII. like the Novells.

Corpus
Juris Ca-
nonici.

BOOK
I.

THE CANON LAW OF ENGLAND.

*Canon
law of
England.*

1. While the English Church as a part of the church universal, was governed before the Reformation by the Canon law of Rome, there arose also within the kingdom the English Canon law which sprung from the polity of the English Church; this consisted of the legatine and provincial constitutions.

*Legatine
constitu-
tions.*

The legatine constitutions were made in national councils, held within the realm, the Pope's legate presiding, in the time of Otho, legate of Gregory IX., in the year 1220; and of Othobon who was legate under Clement IV., in the year 1268. Their authority extended to both provinces of Canterbury and York.

*Provincial
constitu-
tions.*

The provincial constitutions were made in convocations of the clergy of the province of Canterbury, the Archbishop presiding; they commence in the reign of Hen. III. and ended in that of Hen. V. Although made only for the province of Canterbury, they were adopted by the province of York in convocation in the year 1463¹.

It may be asked what is now the force and authority of the Canon law in England?

*Authority
of the Ca-
non law.*

Henry VIII. considering the Canon law at the Reformation as "much prejudicial to the king's prerogative royal, and repugnant to the laws and statutes of this realm," obtained an Act of Parliament, which is 25 Hen. VIII. c. 19, empowering him to appoint a commission of thirty-two persons to revise the Canon law. Henry never exercised the power.

In the following reign an Act passed (3 and 4 Ed. VI. c. 11) conferring upon the king the same

¹ They who wish to pursue this subject more deeply may consult the article "Canon law," in the *Encyclopedia Metropolitana*.

power, and Edward named thirty-two Commissioners, who compiled the *reformatio legum ecclesiasticarum*. This act of Edward, together with the Statute 25 Hen. VIII. c. 19, was repealed by 1 and 2 Phil. and Mary, c. 8, but was revived by 1 Eliz. c. 1, and is now in force. It declares that "the Canons, Constitutions, Ordinances, and Synodals Provincial, are law, so far as they are not contrary and repugnant to the Common law, the Statute law, and the Royal Prerogative." This defines the authority of the Canon law.

CHAP.
I.

THE CANONS OF THE CHURCH OF ENGLAND.

These were passed in the Convocation of the Clergy of the province of Canterbury in the year 1603, in the reign of James I. They are 141 in number, and concern the rights, order, and discipline of the Church; they were ratified by the king for himself and successors; and were afterwards received and passed in the province of York. It was decided by Lord Hardwick in the case of *Middleton v. Croft* (Strange's Reports, 1056), that as far as they are agreeable to the ancient Canon law they bind the laity, where that law can be said to be binding; but inasmuch as they never received the sanction of Parliament they do not bind the laity *proprio vigore*, even in matters ecclesiastical.

*Canons of
the Church
of Eng-
land.*

*Their au-
thority.*

THE FATE AND FORTUNES OF THE CIVIL LAW IN EUROPE, AND PARTICULARLY IN ENGLAND.

Soon after Justinian's death the whole of Italy became overrun by barbarian conquerors, and in the year A.D. 752 was separated by the Franks from the Eastern empire; after which period the

*The Civil
law after
Justinian.*

BOOK
I.

laws of Justinian fell into obscurity, still however maintaining an existence alongside the law of the conquerors. Rome was taken by the Goths in the year A.D. 546. After they were expelled by Justinian he published his laws at Rome; and established a school of law there in 554.¹ When the barbarian rule had become complete in Italy the Roman law still survived. The municipal towns established under the Romans continued to be governed by the Roman law; and generally Romans used the Roman, and the barbarians the barbaric Code. When any one went to law it was usual to make the *professio legis* before the judge, which was a declaration as to the law by which the party chose his case to be tried². Besides, the clergy always used the Roman law: hence we may conclude that it was never extinct in Europe. Its sudden revival in the middle of the 12th century instead of being attributed solely to the accidental discovery of the Digest at Amalfi, and the Code at Ravenna, is rather to be accounted for by the sudden rise of commerce in Northern Italy at that period. An abstract love of the science of law could not account for the diligence and energy with which it began to be studied at the close of the twelfth century.

*Causes of
revival.*

*The Civil
law in
England.*

With regard to the Civil law in England, it was first introduced by Theobald, a Norman archbishop of Canterbury, who placed Roger Vacarius, a Lombard, at Oxford, to teach it. The English lawyers of that period were much opposed to the Civil law, so they contended that it was hostile to the liberties of England, though it would be difficult, if not impossible, to shew this. The Norman nobility were hostile to it; and King Stephen, who was completely in the power of his barons, issued an order against the study of it, and altogether prohibited it. The two parties however

¹ Warnk. Com. I. 75.

² Savigny, II. 197—260; Warnk. Com. I. 75—78.

still continued to exist—the common lawyers, who were laymen, and the civilians, the clergy; the one arranged against the other. This is apparent by reference to the Statute of Merton, 20 Hen. III. c. 9, which declares that “he is a bastard who is born before the marriage of his parents.”

CHAP.
I.

Statute of
Merton.

The clergy on that occasion endeavoured to introduce the *Legitimatio per subsequens matrimonium*¹ of the Civil law. This was the last direct attempt made to introduce the principles of the Civil law into England.

At the same time, although the Civil law was never directly adopted in any of its parts as the law of England, its indirect influence has been very great. The divisions of the “year-books”² (the early law reports), all shew how much they were influenced by the Civil law. All the early chancellors were ecclesiastics, and they drew largely from the *Corpus Juris*. By these means our Common law has become full of the principles of the Civil law.

The Civil law is used in (1) the Courts of Admiralty; (2) the Ecclesiastical Courts; and (3) the Courts of the two Universities of Oxford and Cambridge; but in all these the Common law has reserved to itself a paramount authority. An appeal lies from all of them to the Sovereign in the last resort³.

¹ See ch. 7, post.

² Stephen's *Black.* i. 66.

CHAPTER II.

Of Law in general, and of the divisions and parts of the Civil law.

BOOK I.

“JUSTICE is a disposition of mind to render to every one his right. Rights are perfect or imperfect: from the idea of right is produced that of obligation.”

Justitia.

Justice is defined by Ulpian to be *constans et perpetua voluntas juxta suum cuique tribuendi*¹, and

Præcepta Juris.

the three *præcepta juris* are *honeste vivere, alterum non lædere, suum cuique tribuere*². Hence we

Rights and obligations.

arrive at rights and obligations, which are the creatures of the Civil law. In entering upon the consideration of the rights of persons it is necessary to have a correct understanding as to rights and obligations. Until human society began to be formed they could have no existence, nor could they be perfectly defined until the *Jus Civile* of society was established. Rights and obligations can only have a place in civil society, and they arise by the application of law to objects. For example, if I agree to sell my horse to my neighbour for £20, and he having paid into my hands the £20 so agreed on, if I then refuse to deliver to him the horse, the law will compel me. The law of buyer and seller applied to the above-mentioned transaction creates the right, and its reciprocal obligation. I am bound, and may be forced, to satisfy his just claim, his right, by performing my obligation.

How created.

Reciprocal.

From the idea of right is produced that of obligation; that is to say, they are reciprocal; the

¹ D. I. I. 10.

² Id.

one cannot be established without at the same time creating the other. They are also perfect and imperfect. A perfect right is that in which the law will compel the performance of its reciprocal obligation; but a right, however perfect in a moral sense, if it do not come within the province of the law is unable to enforce its reciprocal obligation, and is therefore an imperfect right. The law will compel me to pay my just debts: this is a perfect legal obligation. But there is no law to compel me to relieve the beggar, however great his distress; a moral obligation rests upon me, but the law will not help him: there can be no doubt as to his right and my obligation in a moral sense, but inasmuch as they cannot be enforced they are reciprocally imperfect.

CHAP.
II.

Perfect
and im-
perfect.

We here see the distinction between Jurisprudence and Ethics. Law compels the performance of our duties by public authority, while the science of Ethics only teaches us our duty and the reasons of it.

*Jurisprudentia est divinarum atque humanarum rerum notitia, justī atque injustī scientia*¹. Jurisprudence is either universal or particular; the former relates to the science of law in general, and investigates those principles which are common to all systems of law alike. Particular jurisprudence refers to the laws of particular states, which have been drawn from the rules and principles of universal jurisprudence, and adopted by those states.

Jurispru-
dence:
1. Univer-
sal;
2. Particu-
lar.

Law is a rule of action prescribed by some superior, and which the inferior is compelled to obey. This is the definition of law in its most extensive signification. The solar system will furnish us with an example; or, to test the accuracy of this definition more minutely, place two weights connected together by a cord over a pulley, one of

Law.
General
definition.

¹ D. I. I. 10. 2.

BOOK
I.

which is heavier than the other, it would be impossible to balance them; the heavier in its descent would continue to send up the smaller to the end of time. Make them equal, and they will remain at rest. There is no longer any superior, and the *rule of action* is gone.

Municipal
law.

Law in its more confined sense denotes the rules of human action and conduct. Municipal law is a rule of civil conduct, prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong.

All law is natural or instituted. The law of Nature, the law of Nations, and the Civil law were distinguished from each other by the Roman lawyers.

Jus.

Jus is defined by Celsus as *Ars boni et æqui*¹.

Jus Natu-
rale.

It is divided into—1. *Jus Naturale*. 2. *Jus Gentium*. 3. *Jus Civile*. "*Jus Naturale est quod natura omnia animalia docuit*²," e.g. self-preservation, the procreation of the species, &c. *Jus Gentium* is defined by Justinian as "*quod naturalis ratio inter omnes homines constituit*³." Puffendorf defines it as *ipsum jus naturale integrarum gentium negotiis et causis adplicatum*⁴. By modern writers it is reduced to the simple term *jus inter gentes*, that law which governs the intercourse of civilized nations with each other.

Jus Gen-
tium.

Jus Civile.

*Jus Civile est quod quisque populus sibi constituit, et cujusque civitatis proprium est*⁵. It is the law by which each independent state is governed.

Jus Sin-
gulare.

Jus Singulare, called also *Privilegium*, was where any privilege was granted to a person or class of persons, contrary to the *Jus commune*. The will of a soldier, and the *Senatusconsultum Velleianum*, may be taken as examples⁶.

Jus Feciale.

Jus Feciale. The *Feciales* were a body of

¹ D. I. I. I. I.² Inst. I. 2.³ Inst. I. 2. I.⁴ Lib. II. c. 3.⁵ D. I. I. 9.⁶ Colq. I. 298.

priests said to have been established by Numa, whose business it was to declare war, and to ratify peace with neighbouring nations. The rules and regulations established by them were called the *Jus Feciale*¹. CHAP.
II

Lex is defined by Papinian as *commune præceptum, virorum prudentium consultum: delictorum quæ sponte vel ignorantia contrahuntur coercitio: communis reipublicæ sponsio*. Laws are classed under four heads by Modestinus, *Legis virtus hæc est: imperare, vetare, permittere, punire*². *Lex* differs from *Jus* as the species differs from the genus.

Lex is what was enacted by the whole body of the Roman people, assembled at the *Comitia Curiata* or *Centuriata*, at the recommendation of one of the greater magistrates.

The oldest legislative assembly of the Romans was the *Comitia Curiata*, divided into three tribes, the *Ramnes*, *Tities*, and *Luceres*, which were subdivided into thirty *curiæ* consisting of patrician families. *Servius Tullius*, the sixth king of Rome, introduced a material change u.c. 176. It became necessary to recognise the *plebs* as part of the *populus*, which was not the case in the *Comitia Curiata*. He established the census³, and arranged the citizens when assembled for legislative purposes according to their order when on military service, that is, according to their property. This arrangement considered the whole state as forming a regular army, and it consisted of 195 centuries, thence called the *Comitia Centuriata*, which continued to be the form of the legislative body until its functions were suspended and finally extinguished by the emperors⁴. Comitia
Curiata.

198
Centuriata.

The *Comitia Centuriata* met in the *Campus Martius*. The consul presided, and put the question to the people when the moment for voting

¹ Colq. I. 287.

² D. I. 3. 1.

³ D. I. 3. 7.

⁴ Haub. II. 32.

⁵ Colq. 25.

BOOK I. came; hence Lex is said to be *quam populus Romanus constituit superiore magistratu rogante*¹.

Lex. The institution of the tribunes and the Comitia Tributa date from the year u.c. 260.² The plebs then acquired the right of holding their own comitia, and of passing laws by the Lex Horatia obligatory only upon themselves. This assembly was summoned by the tribune who presided; it did not

Lex Horatia.

Plebiscitum.

meet in the Campus Martius, but generally in the Flaminian Circus. The laws passed by the plebs were called Plebiscita, i.e. *quæ plebs plebeio magistratu interrogante, veluti tribuno constituebat*. So long as a plebiscitum bound only the plebs it differed from a lex, but in the year u.c. 469,³ when the Lex Hortensia was passed, the patricians were compelled to acknowledge the obligatory force of the plebiscita, and from this time they were in fact leges⁴. The Lex Aquilia, Falcidia, Voconia, and many others, were plebiscites.

Mode of passing a Lex. In passing a Lex the proceedings observed were as follows:

First, it was drawn up in writing.

Secondly, permission to lay it before the *populus* was asked of the senate. If this were granted,

Promulgatio.

Thirdly, it was published by being fixed up in some public place during *trinundinum*, three market days, that the voters might be made acquainted with its provisions.

Recitatio.

Fourthly, due publication being made, a herald ascended the rostrum in the Campus Martius, and made the *recitatio*, i.e. he read the law to the assembled voters; then followed,

Suasio.

Fifthly, the *suasio* and *dissuasio*, the debate.

Sortitio.

This being over, a pause took place in the proceedings during the *sortitio*, which was the arranging the order of voting of the centuries by ballot. 195 tallies, the number of the centuries, marked from 1 to 195, were put into an urn and drawn out.

¹ Hein. *El.* 46.

² Haub. II. 38; Hein. *Ant.* I. 2. 18.

³ Haub. II. 32.

⁴ Bach. II. I. 17.

The number which came out first decided the century which was to vote first, and so throughout. The century to which the lot fell to vote first was called *centuria prærogativa*, the second *secundo vocata*, and so on. This prevented confusion. Here the proceedings might be stopped by the veto of the tribunes, or the adverse interpretation of the auspices. "Si nihil sinistri obnunciabatur," the presiding magistrate then put the question, *rogabat populum*, in the usual form, *Velitis, jubeatis, Quirites*, &c. The centuries then departed to the *pontes*, or poll-booths, erected in the Campus Martius. "Hi nihil aliud erant," says Heineccius, "quam angustæ quædam substructiones, opere subitaneo, e tabulatis solo editis adornatæ, per quas iis, qui suffragia ferrent viritim esset transeundum¹." The *pons* consisted of a narrow passage along which the voters could only pass in a line, one behind another. At the entrance stood the distributor, who gave to each voter as he came up two tallies, on one of which was inscribed the letter A. i.e. *pro antiqua lege*; upon the other the letters U.R. i.e. *uti rogas*; the voters passed on, and at the other end stood the *custodes*, poll-clerks, who received from the voter whichever tally he chose to deliver. This done, the voter stepped down into an enclosure, called the *cancellus*, where all were confined till the votes of the whole century were given. The voting being over, the next step was the *suffragiorum direemptio*, the sorting the votes; if the tallies marked A. prevailed, the proposed law was said to be *antiquata*, rejected. If those marked U. R. had the majority, the law was passed, and was said to be *scita* or *perlata*.

Lastly, the *confirmatio* took place, which was done jure jurando, with solemn oaths and sacrifices. The law was then engraved on brass, and fixed up in the *Ærarium* in the temple of Ceres, which was under the care of the *Ædiles*.

¹ Hein. Ant. l. 2. 11.

² D. XLVIII. 13. 8.

BOOK
I.

The names of the laws were generally taken from the Gentile names of the two consuls of the year in which they were passed, as the *Lex Ælia-Sentia*. Occasionally they were named from the Dictator or Prætor who introduced them, as the *Lex Æmilia*; and sometimes from the subject of the law itself, as the *Lex Cassia agraria*¹.

The election of magistrates was done in the same manner at the pontes; the tallies having the names of the candidates inscribed upon them.

When the
ballot was
introduced.

The Roman people appear not to have voted by ballot before the year U.C. 615.² Cicero, speaking of the *leges tabellariæ*, which established this mode of voting, calls them “*vindices tacitæ libertatis*,” and “*principium justissimæ libertatis*,” and in his oration *pro Plancio*, he says, “*Populo grata est tabella, quæ frontes aperit hominum, mentes tegit: datque eam libertatem, ut quod velint faciant: promittant autem quod rogentur*.” The Roman juries also gave their verdict by tallies, using three. On one was inscribed A. *Absolvo*; on the second C. *condemno*; on the third N. L. *non liquet*³.

The Plebs.

The Plebs are defined as *cæteri cives sine senatoribus*. They were arranged in thirty tribes, four in the city and twenty-six in the country. The plebiscita were passed by them when assembled, and voting *tributum*, the Tribune presiding. There was no asking leave of the Senate, and no consulting the auspices. The proceedings in other respects were the same as in passing a lex.

Senatus-consultum.

A *Senatusconsultum* was a decree of the Senate concerning such things as were committed to their jurisdiction which had not properly the force of law, unless confirmed by the people. It is necessary here to explain the constitution and authority of the Senate during the Republic, and under the emperors. It appears that during the

¹ Hein. *Ant.* I. 2. 14.

² Id. I. 2. 10, and *App.* I. 1. 31.

³ Hence the third verdict of the Scotch Law, “not proven.”

Comitia Curiata the number of the Senate was 300, and it consisted only of the patrician order. When Servius Tullius organised the Comitia Centuriata, and established the census, the Senate was then opened to the plebeians, for a certain amount of property was necessary to acquire and to preserve the equestrian rank; so that whilst a plebeian might obtain, a patrician might lose the rank¹. The office of Censor was established in the year of the city 311, when it appears that all the Curule magistrates, and also the Quæstors, had, by virtue of their office, a seat in the Senate; and after the institution of the Censorship, the Censors had the right to elect new members into the Senate from among the ex-magistrates, and to exclude such as they deemed unworthy². The Senate, therefore, gradually became an assembly representing the people, for the Censors were confined in their nomination to such persons as had received the confidence of the people by their previous election to a magistracy in the Comitia. During the Republic, the Senate was a council of state with no legislative power. They had the superintendence of the treasury and the coinage; the management of embassies; the administration of the provinces subject to Rome; and the appointment of days of public prayer and thanksgiving³. When Augustus became emperor the Comitia were discontinued, and upon the accession of his successor Tiberius, A.D. 14, the right of electing magistrates, which the people had so long and jealously kept in their own power, was transferred to the Senate⁴. From this period the Senatusconsulta became leges, and are found in the *Corpus Juris* with their distinctive titles, such as the Senatusconsultum Trebellianum, Pegasianum, Macedonianum, &c. But as the Senate under the Republic had nothing more than a veto upon an absurd or obnoxious law, so now it was

CHAP.
II.*Constitution of the Senate.*¹ Gravina, 3.² Cicero de Leg. III. 12.³ Hein. Ant. I. 2. 45.⁴ Haub. II. 50.

BOOK
I.*Mode of
voting in
the Senate.*

nothing more than the echo of the emperor's will. He made his *relatio*, whereupon the Senate voted *pro forma*. "Eo prolapsa erat patrum adulatio, ut orationes Principum non nisi acclamationibus exciperent¹." When the Senate met for business the consul presided. He made the *relatio*, which was a statement of the subject, ending with the usual form *Referrimus ad vos P. C.*; then followed the debate, after which the votes were taken, sometimes separately, sometimes *per discessionem*, and the house divided. *Pedibus ire in sententiam* was to give a silent vote. If the proposed measure were carried, it was reduced to writing. Finally, the *Confirmatio* was essential to give it authority. This was by the tribune affixing his official signature T., without which it did not become a *Senatus-consultum*, but was merely *Senatus auctoritas*, the opinion of the Senate.

*Senatus
auctoritas.**Edicta ma-
gistra-
tuum.*

Edicta magistratuum are edicts of the Prætors and Ædiles, which together made up the system called Jus Honorarium.

*Prætor
Urbanus.*

In the year u.c. 387² one of the consuls was for the first time elected from the plebeians. Up to this period it would appear that the consuls had discharged the office of administering justice. It is said the patricians made this concession to the plebeians only on condition that a new magistrate should be created to discharge the duties of the consuls in their absence³. This was the Prætor Urbanus, first elected in the year above mentioned, and to whom was especially assigned the province of administering justice. It may be doubted whether this alone was the real cause that called the Prætor into existence. It seems to be better explained from the fact, that the administration of justice was no longer the simple process which marked an infant state, but that it was becoming so complex and onerous that it required some one whose

¹ Hein. Ant. I. 2. 54.² Haub. II. 34.³ Bach. 49.

habits were fitted for, and whose time should be dedicated to, the discharge of it. The office of Prætor was annual. He was elected in the Comitia. After his election, and previous to entering upon the duties of his office, he published his Album, his rules of court, whereby he set forth those cases of which he would take cognizance, together with a declaration in some instances of the amount of redress he would give the suitor who proved his case, such as *in simplum dabo*, *in duplum dabo*, &c. The power of the Prætor in the administration of justice was expressed in these three words: Do, Dico, Addico. Dabat, he granted petitions to sue and to plead. Dicebat viam in vindiciis, he determined what form of action the plaintiff should adopt. Addicebat, he gave judgment. For a long period each Prætor, at the commencement of his office, was at liberty to expunge from the Album any rules he might deem inexpedient, and to add such as he considered advisable. Those which he adopted from his predecessor were called *tralatitia*, his own *nova edicta*. It is evident that many of the leading rules of the Album would soon become so firmly established, that no Prætor could venture to tamper with them without deranging the recognised procedure of the court; still the ever-advancing wealth and interests of the Republic would cause the multiplication of new rules, and the occasional modification of old ones: and thus the Album gradually swelled to a large volume.

In the year U.C. 687 the *Lex Cornelia* restrained the Prætor from making any alteration in his rules of court during his year of office¹. Previous to this time the Prætor occasionally issued his *Edictum repentinum*, professedly to meet some unexpected case which came before him, which savoured very much of an *ex post facto* law, and which opened the door to great corruption. In the reign of

CHAP.
II.Prætor's
Album.His power
and authority.

Lex Cornelia.

Edictum
repentinum.¹ Hein. *Ant.* I. 2. 22.

BOOK
I.*Edictum
perpetuum.**Jus Hono-
rarium.**Prætor
peregrini-
us.**Responsa
Pruden-
tum.*

Hadrian, A.D. 131, the Edicta of the Prætors were, by his command, collected and published by Salvius Julianus in one volume. This contained the continuous series of Edicta then extant, and was, therefore, called the *Edictum perpetuum*, or *Jus Honorarium*, being chiefly derived from the *Album* of the Prætor Honoratus, and from this time became part of the written law. Many of the most distinguished lawyers, and among them Pomponius, Gaius, Paulus and Ulpian, wrote comments on the *Edictum perpetuum*. The *Jus Honorarium* thus became the *viva vox juris civilis*¹; and it is described by Pomponius as “quod Prætores introduxerunt adjuvandi, vel supplendi, vel corrigendi juris civilis gratia, propter utilitatem publicam².”

In the year U.C. 488³ a second Prætor, called the Prætor peregrinus, was created, whose duty it was to hear and determine all matters where a peregrinus was one of the suitors. At the latter end of the Republic, and in the reign of Augustus, there were sixteen Prætors to whom various departments were assigned, such as the Prætor tutelaris, the Prætor fiscalis, &c.

Responsa Prudentum are opinions of those to whom it was permitted to answer authoritatively on matters of law. These, collected together, were called emphatically *Jus Civile*⁴.

The Jurisconsulti had their origin in the early period of the Roman Commonwealth, when the *Jus Patronatus* was established. The plebs were the clientes of the patricians. Any plebeian might choose whom he pleased as his patron, who was obliged to advise, and to defend him in courts of justice; whilst, on the other hand, the client was expected to perform a variety of services for his patron. These on both sides were gratuitous⁵. This state of things was only adapted to the in-

¹ D. I. I. 8.² D. I. I. 7.³ Haub. II. 34.⁴ D. I. 2. 2. 5.⁵ Hein. I. 2. 30.

fancy of the Republic, for as the *Jus Civile* became gradually developed, it is obvious that the ordinary patronus would, in many instances, be unfit to deal with his client's case: the more astute of the patroni were, therefore, sought out by the clients, and thus, from the simple *Patronus*, arose gradually the *Jurisperitus*. This accounts for all the early lawyers being patricians. The house of the Roman lawyer was the common resort of every one who was involved in any legal difficulty¹. The *jurisperitus* was consulted as he walked about the Forum; and he had what we should call an office, or chambers, where he sat². The client on entering said, *Licet consulere?* If he were disengaged he answered, *Consule*. The client then stated his case as concisely as possible, adding, *Quæro an existumes?* The lawyer replied, *Secundum ea quæ præponuntur, existumo, puto, sentio, &c.*, and gave his opinion very briefly, with no reason for his answer.

These *responsa* being collected, and arranged under the different heads of which they treated, when recognised by the *usus Fori*, became one of the most important parts of the Roman law, and were entitled the *Responsa Prudentum*, comprising, at the close of the Republic, one of the chief heads of the unwritten law.

When Augustus became emperor he gave authority to certain lawyers in particular (six in number³) *respondere de jure*, and decreed that their *responsa* should be regarded as law, hence called *Auctoritas Prudentum*⁴. This decree does not appear to have interfered with the *responsa* of the *jurisprudentes* in general, who at that period must have been very numerous.

Placita Principum are constitutions of the Roman emperors. These were, 1. General. 2. Special. The general were *Epistolæ*, *Decreta*, *Edicta*. The special were called *Privilegia*.

CHAP.
II.

¹ Cicero *de Orat.* I. 44.

² Id. *de Leg.* I. 3.

³ Haub. II. 47.

⁴ Gai. I. 7.

BOOK
I.

These commence in the reign of Augustus, who by the *lex regia*, or the *lex imperii*, became solutus legibus, and so invested with arbitrary power. These constitutions cannot be better explained than in the words of Ulpian. "Quod Principi placuit legis habet vigorem : utpote cum lege regia, quæ de imperio ejus lata est, populus ei et in eum omne suum imperium et potestatem conferat. Quodcunque igitur Imperator per Epistolam et subscriptionem statuit, vel cognoscens decrevit, vel de plano interlocutus est, vel edicto præcepit, legem esse constat. Hæc sunt quas vulgo constitutiones appellamus¹."

Epistolæ et rescripta.

Epistolæ, or *rescripta*, were answers of the emperor to questions proposed to him for solution. If directed to public officers they were termed *epistolæ*, if to private individuals, annotations or subnotations. If to corporate bodies, *sanctio pragmatica*.

Sanctio pragmatica.

Decretum.

A *decretum* was the decision of the emperor upon some legal point which had been referred to him. It was not a general law, unless declared to be so in the body of the decree, until the time of Justinian².

Edicta.

Edicta were general in their application, as for instance the edict of Augustus declaring that the evidence of slaves should be taken in cases of capital crimes³. *Mandata* were orders and instructions sent to governors of provinces, *e.g.* forbidding a public officer to marry a native of the province in which he was stationed⁴.

Mandata.

The unwritten law.

The unwritten law is custom.

Custom is thus defined, *Jus moribus constitutum*⁵. The difference between the written and the unwritten law is the authority which enacts them; and it must be observed that they are not different kinds of law; they are the same laws only differ-

¹ D. I. 4. 1.

² C. I. 14. 12; Colq. I. 318.

³ D. XLVIII. 18. 8.

⁴ D. XXXIV. 9. 2. 1.

⁵ D. I. 3. 32. 1.

ently expressed. The will of the legislative power in each country determines the written law. The *tacita civium conventio*, joined with long and constant exercise, is the foundation of the unwritten law¹. The written law of the Romans was comprised in the *leges*, *plebiscita*, *senatusconsulta*, and the *placita principum*; these, as soon as written and published, were in full force as laws; but the *edicta magistratuum* and the *responsa prudentum* constituted the *lex non scripta*, because these had no force of law until adopted and established by long and constant usage.

The written law can abrogate custom by an express enactment to the contrary, but in case of ambiguity the unwritten may prevail against the written law².

Custom constitutes a portion of the *Jus civile* of every civilized community. The term "unwritten" remains to be explained. And taking the law of England as an example, the common law may be found everywhere discussed in books of reports and judicial decisions, and is so handed down to us, but it is still the unwritten law, because its *original institution* and authority is not set down in writing as in the case of an Act of Parliament, its binding power and force of law being derived from long and immemorial usage.

¹ D. I. 3. 33.

² D. I. 3. 38.

CHAPTER III.

Of Persons in general, and of Freemen and Slaves.

BOOK
I.

PERSONS are considered either in their natural or civil capacities. In their natural capacity they are considered with regard to, 1. Life. 2. Sex. 3. Age.

Nascituri.

As to life they are *nascituri* or *nati*.
An unborn infant, *nasciturus*, may be the object of rights and privileges, and thus was entitled, if posthumous, by the Roman law, to its share of the intestate father's estate; and if the father died testate before its birth without having left it its legitimate portion, the rights of the *nasciturus* rendered the will void¹.

Nati.

Nati. A child must be duly born, separated from the mother, alive. It must be *homo*, that is, endowed with a rational mind in a human body, otherwise it will be considered as a monster, and incapable of rights and privileges².

Sex.

Sex. Males and Females. The position of the two sexes was very unequal among the Romans. A woman had no parental power over her children, nor could she be guardian to her children or grandchildren, nor could she make a will during the Republic. After the establishment of the Empire their position became better³.

Age.

Age. The Romans thus divided the period from birth to majority.

Infancy. Males and females from birth to seven years of age.

¹ D. I. 5. 26; and see *post.* book II. ch. 6.

² D. I. 5. 14.

³ D. I. 5. 9.

Puberty. Minus plena. Males fourteen, females twelve. CHAP.
III

Puberty. Plena. Males eighteen, females fourteen.

Majority. Plena ætas. At twenty-five years.

The above ages must be complete.

In their civil capacity their state is denominated from respect to 1. Liberty. 2. City.

3. Family.

The first division of persons in a civil consideration is into freemen and slaves.

Slavery in the Civil law had three origins. *Origins of slavery.*
1. Captivity in war. 2. Birth. 3. The sale of a man's self to another. None of these are justifiable causes of slavery.

Slavery is thus defined. "Servitus est constitutio juris gentium qua quis dominio alieno contra naturam subjicitur¹." *Servitus.*

The Roman slave was a mere human being without the smallest civil right, and he was, therefore, regarded as a chattel; *res*, a thing, which might be sold, or be bequeathed as a legacy to whomsoever his owner pleased. Being endowed with a rational mind in a human body he was *homo*; but he was not *persona*. *but a free man was a persona.*

"Persona est homo cum statu quodam consideratus. Status est qualitas cujus ratione homines diverso jure utuntur. *Persona.*

Quicumque igitur nullo statu gaudet, jure Romano, non persona sed res est²."

1. As to captivity in war. It is declared by the Roman law, that "quæ ex hostibus capiuntur, jure gentium statim capientium fiunt³." They who were captured pugnantes in acie were reduced to slavery, and sold sub corona as a part of the plunder.

2. Slavery by birth. The children of slaves could be in no better position than their parents. These were the vernæ, born in the house of the

¹ D. I. 5. 4. 1.

² Hein. El. 75. 76.

³ D. XLII. 1. 5. 7.

BOOK I. master of those slaves who were living in contubernio.

3. Slavery by the sale of a man's self to another. Persons who allowed themselves to be sold by another for the sake of sharing the money of which the buyer was thus defrauded, were declared to be slaves ; nor, if afterwards manumitted, could they ever recover their *ingenuitas*¹.

*Slavery by
the Law of
Nations
unjustifi-
able.*

None of these were justifiable causes of slavery. With regard to the first, it was said the conqueror had a right to the life of his captive, and having spared his life he had a right to sell him into slavery ; but if he could subdue his enemy without taking his life in self-defence, he had no right to kill him. The selling of a prisoner of war into perpetual slavery is contrary to the law of nations, because by the *Jus postliminii*, on the re-establishment of peace, all things resume their former state, and the prisoner of war is entitled to return to his country. At the same time, it must be admitted, that though slavery is contrary to the law of nature, it is not, therefore, contrary to the positive law of any state where it is imposed as a punishment for crimes ; it must also be remembered that lawful war is not a crime, and that an alien enemy taken in arms against the state of his captor, is no violator of the Civil law.

Secondly, in the case of slavery by birth, if the parents be unjustly slaves, the children must be so likewise.

Thirdly, self-sale is absurd, because since a slave could possess no property, for whatever he obtained belonged to his master, and he would become a slave as soon as the price was agreed upon, the master paid nothing, and the slave received nothing. But it is evident from the passage in the Digest, "*ad pretium participandum venire passus est*," that the buyer was deceived by a third party who offered the supposed slave, and received the

¹ *D. I. 5. 21.*

² *D. I. 5. 5. 1.*

price; and as the sale of a freeman was void, the party sold took the earliest opportunity to proclaim his liberty, and received his share of the money thus fraudulently obtained. To suppress this it became necessary to consign such an one to perpetual slavery; but the buyer must be ignorant of his being free¹.

CHAP.
III.

The following were also reduced to slavery as a punishment by the Civil law.

Slavery by
the Civil
law.

1. They who refused to register their names on the census, or to serve in the army. 2. They who were condemned to work in the mines, or to fight with beasts in the circus. 3. Freed men and women whose manumissions were cancelled for ingratitude to their patrons. 4. Free women cohabiting with slaves. 5. Outlaws². These are all cases of penal servitude lawfully imposed by the Civil law.

+ *Ant.*

Aristotle's opinion of natural slavery is groundless.

Aristotle's
view of
Slavery.

Aristotle, in his *Politics*³, contends that there is a providential distribution of the abilities of mankind, and that in every community may be found those whom the Creator has intended for slaves by denying them all fitness for any higher position. Were this so the offices of the Roman slave would in every case have been menial; on the contrary, we find them holding situations which required talent to discharge the duties attached to them: they were literati, medici, amanuenses, &c., and yet politically there was no difference between them.

Slaves were: 1. Ordinary. 2. Peculiar; otherwise vicarial.

The *servus ordinarius* was the slave who was either purchased by his owner, or who came into his possession by bequest or inheritance. The ordinary slave had some particular duty assigned him; he was a cook, or a baker, or a fuller, or a tailor, &c. The *servus vicarius* was the slave of a slave; he

*Servus Or-
dinarus.*

Vicarius.

¹ D. XL. 10. 12. 2.

² Hein. *Ant.* 1. 3. 5.

³ *Polit.* 1. c. 2.

BOOK I. was purchased with the peculium of the servus ordinarius: *Peculium est pusilla pecunia, quam filius familias vel servus a rationibus paternis vel dominicis seperatam habet*¹: a very small sum of money which a son or a slave is allowed to retain from his father's or master's accounts. For though a slave could possess nothing legally, all that his labour produced being his master's, yet as many of the slaves held situations of trust, it became advisable to allow them a certain amount of property as an encouragement to fidelity. The servus vicarius therefore represented the peculium of the servus ordinarius, and like it he would be liable to be seized for the debts of the master in case of his insolvency.

Power of the Master. The power of the master over his slave consisted in three things. 1. He could put him to death. 2. He could transfer him by sale or gift to whom he pleased. 3. Whatever the slave acquired belonged to the master.

In the early period of the Republic the master might put his slave to death, induced by mere passion or revenge; and so late as the time of Juvenal it appears by the following passage that the barbarity of masters was carried to a great extent:

“O demens, ita servus homo est?”

After the Republic the unbounded license of slave-owners was repressed by imperial constitutions, and they were not allowed in “servos suos sævire supra modum, et sine causa legibus cognita².” Hadrian banished a woman of the name of Umbria for five years, who, upon the slightest excuse, had treated her slaves with great atrocity³. The slave being classed among the mancipia, the chattels of the Roman law, was therefore an article of commerce, and the subject of gift or bequest. He was sold in the public market, and the seller

¹ Hein. *El.* 473.

³ *D.* 1. 6. 1. 2.

² *Sat.* vi. 222.

⁴ *D.* 1. 6. 2.

was expected to give a warranty if he declared him sound¹. CHAP.
III.

Since the slave could possess nothing but his peculium, whatever was acquired by his work and labour belonged to his master.

"The decline of domestic slavery in Europe was greatly owing to the Christian religion." *Decline of
domestic
Slavery at-
tributed to
Christian-
ity.*

The establishment of Christianity had doubtless a powerful effect in lessening the rigours of slavery as it had previously existed. It is from Christianity that we learn the duty of doing as we would be done by, as well as the great truth that all are equal in the sight of God. Whatever has been done in the world to lessen the evils of slavery has arisen from the spread of these principles, and not till these are triumphant will slavery be extinct in the world. Some of the Roman emperors, from a high moral feeling, did much to lessen the miseries of slavery, but no system of morality could effect its suppression.

Freemen were, 1. Ingenui. 2. Libertini. The condition of the mother determined the state of her child as to freedom or slavery. The law of England differs in this respect from the Civil law.

Ingenus est qui statim ut natus est liber est. *Ingenus.*
The ingenuus was he who was born of a mother who, at the time of conception, or of birth, or at any time between conception and birth, was free². The maxim of the Roman law is *Partus sequitur ventrem*, the child follows the condition of the mother; but this applies only to cases *extra matrimonium*; for if the child be conceived *in matrimonio* its condition dates from its conception³. By the law of England "*partus sequitur patrem*." He is pater whom nuptiæ demonstrant. If there be no nuptiæ there can be no pater; hence the term *filius nullius*.

If an ingenuus fell into slavery and afterwards regained his liberty he did not become libertus,

¹ D. XXI. 2. 31.

² I. I. 4.

³ Gai. I. 89 and 92.

BOOK I. but was again ingenuus, that is, he recovered his former status. *Aliud est in servitute esse, aliud servum esse—illud facti—hoc juris est*¹.

Libertinus. A libertinus was one who from a slave became free by manumission. The rights of the former master to the services of such a person were called *Jura patronatus*.

The terms libertinus and libertus are found used by writers indiscriminately. The former refers more properly to the class, the latter to the individual.

The libertus was he who was manumitted *e justa servitute*. When the master conferred freedom on his slave the relation of dominus and servus ceased, and that of patronus and libertus began, and with it certain reciprocal obligations.

Jus Patronatus. The libertus was bound to maintain his patron, and even the patron's children if they became destitute²; to behave himself with due gratitude towards his patron, and if he became ingratus was liable to forfeit his freedom. The *Jus patronatus* was assignable by the patronus to any one of his family³; and when a slave was manumitted by will, at the same time that the legacy of freedom was given to the slave, the *Jus patronatus* might be bequeathed to such one of the testator's issue as he chose⁴.

Modes of conferring liberty. The patron was bound to maintain his freedman if reduced to indigence; if he neglected this duty he forfeited the rights of patronage⁵. It appears from the law of the *Digest* referred to, that he was at liberty to decline this duty abiding the consequences. He was bound also to act as guardian to the infant children of the libertus⁶. By the ancient laws of Rome liberty could be conferred three ways: 1. Per Censum. 2. Per Vindictam. 3. Per Testamentum.

Every Roman citizen of the age of 25, and sui juris, had his name inscribed, and property de-

¹ Vin. Com. 35.

² D. XXV. 3. 5. 19 and 20.

³ I. III. 9. 2

⁴ D. XXXVIII. 4. 13.

⁵ D. XXV. 3. 6.

⁶ I. I. 17.

scribed upon the Censor's list¹, the *census lustralis*: if therefore a slave had his name enrolled upon this list he thereby became free, provided it was done with the consent of his master. It seems doubtful whether such slave became a full citizen immediately upon his name being entered upon the census, or whether he had to wait the closing of the *lustrum*, the five years from the last revision of the Censor. At all events his liberty was not secure till then.

CHAP.
III.Per Cen-
sum.

Manumission by the *Vindicta* or rod was thus performed. The master appeared with his slave in the presence of the *Prætor*, or some superior magistrate, and placing his hand upon him said, *Hunc hominem liberum esse volo*. The *Prætor* replied, *Dico eum liberum esse more Quiritium*, striking him with the rod. The master then took him by the right hand, and turned him round, *in gyrum actus*², and giving him a slap on the face, *inflicta alapa*, he became a freeman, his name was registered among the *liberti*³, and he assumed the *pilleus*, or cap of liberty.

Per Vin-
dictam.

The manumission *per Testamentum* was where the master gave the slave his liberty as a legacy in his will, e.g. *Davus servus meus liber esto*; in which case the slave became free on the death of the master; or where he imposed a *fidei commissum* upon his heir in favour of the slave, e.g. *Quæso heredem meum ut Davum manumittat*. Here the heir would be bound to manumit the slave by the *vindicta*.

Per Testa-
mentum.

Other less solemn modes of manumission were afterwards introduced by the Roman emperors. These were, 1. *Per epistolam*, when the master addressed a letter to the slave, or a third party on his behalf, in which he declared him to be free. 2. *Inter amicos*, declaring the slave free before five witnesses. 3. *Per convivium*, desiring the slave to take his place at table among the company at

Per Epis-
tolam.Inter
amicos.
Per Con-
vivium.¹ D. L. 15. 4.² Pers. Sat. v. 75.³ Hein. Ant. 1. 5. 5.

BOOK
I.

In Ecclesiis.

By adoption.

Latini Juniani.

supper. In the three foregoing cases the slave only became a *Latinus*, but if he were afterwards manumitted by the *vindicta*, he became a full *civis*.

4. In *Ecclesiis*, the particular ceremony of which does not appear, but seems to have been a declaration made by the master in presence of the congregation. See *C. I. 13*. There were also various indirect modes of conferring liberty resulting from the act of the master, as where the master adopted the slave as his son¹, or appointed him heir in his will², or guardian to his infant children³; or if a female slave, with consent of her master, married a freeman⁴.

The several ways of manumission did not all confer the same degree of freedom; but the *Liber-tini* were of three sorts: 1. *Cives Romani*. 2. *Latini sive Juniani*. 3. *Dedititii*. This distinction was abolished by Justinian.

To confer on the slave full citizenship by manumission several things were requisite. 1. He must be in the *quiritarian* possession of his master, that is, the master's legal right to him must be entire and indisputable. 2. The master must be twenty years old, or the manumission was void⁵; and the slave must be thirty years of age. If the slave were under that age he only became a *Latinus Junianus*⁶. In the reign of Tiberius, A.D. 19, the *Lex Junia Norbana* passed, which declared that they who were manumitted otherwise than as required by law should not acquire any greater political privileges than the *Latini*⁷. But a *Latinus* might be raised to the privileges of a full citizen if his master afterwards manumitted him *apud consilium*, *justa causa probata et adprobata*⁸. The *consilium* at Rome consisted of five senators and five equites, and in the provinces of twenty *recuperatores*—magistrates⁹.

¹ *I. I. 11. 12.*² *C. VII. 27. 5.*³ *I. I. 14. 1.*⁴ *C. VII. 6. 9.*⁵ *D. XL. 9. 7. 1.*⁶ *Gai. I. 18.*⁷ See *post.* ch. IV. and *Bach. 194.*⁸ *Gai. I. 18.*⁹ *Id. I. 19.*

The Lex Ælia Sentia, passed A.D. 4, provided among other things that a Latinus might be advanced to the privileges of a Civis Romanus, if he had married a Romana or Latina, and had a son begotten of this marriage a year old; on proof of these facts before the Prætor or Præses provinciæ his claim was allowed¹.

CHAP.
III.

Lex Ælia
Sentia.

The Dedititii were the lowest class of the Libertini; they were neither slaves nor cives, and therefore possessed no political privilege whatever. The term is derived from those who being in arms against the Roman people unconditionally surrendered themselves, *sese dederunt*, and became subjects of the state². But they were not allowed to come within a hundred miles of Rome³. When a slave therefore was so manumitted as merely to confer on him his liberty and nothing more, he was called a Dedititius. These distinctions were entirely abolished by Justinian, as will be seen in connexion with the leges Ælia Sentia and Fufia Caninia.

Dedititii.

The Lex Ælia Sentia restrained a master from manumitting his slaves in certain cases; and the Lex Fufia Caninia limited testamentary manumissions.

The object of the Lex Ælia Sentia was to restrain masters from conferring the full rights of citizenship upon the vilest characters among their slaves, which they often did to be rid of them; also to prevent manumissions whereby creditors were defrauded; and likewise to restrain minors from a reckless manumission of their slaves as a reward for the slave lending himself to their dissolute practices. A passage from Dionysius Halicarnassus will be found in Heineccius⁴ describing the evils which led to this law. It therefore provided that no slave who had been put in chains, or tortured, or branded, or condemned to fight

Lex Ælia
Sentia.

¹ Gai. I. 29.

² Livy, I. 39.

³ Gai. I. 26, 27.

⁴ Hein. Ant. I. 6. 2.

BOOK
I.

with beasts in the circus, if manumitted, should acquire any status higher than a Dedititius. Also that all manumissions in fraud of creditors should be void; and that no owner of slaves under the age of twenty years should be allowed to exercise the right of manumission, unless it were specially granted him; and no slave to acquire more than the privileges of a Latinus if manumitted under the age of thirty years¹.

*Lex Fugia
Caninia.*

The Lex Fugia Caninia was passed A.D. 8.

It appears from another passage quoted by Heineccius from Dionysius Halicarnassus² that masters, when dying, induced by the vanity of having a large procession of freedmen at their funeral, were in the habit of manumitting the whole of their slaves; and among them many *mille supplicia meriti*. The honest part of the community complained, *talibus contaminari civibus*. This law therefore prescribed the number each master might manumit. Every man possessing ~~the~~ slaves might manumit one-half, from ten to thirty one-third, from thirty to a hundred one-fourth, from a hundred to five hundred one-fifth; and no one to manumit at once more than 100. These regulations were all abolished by Justinian³.

¹ Gai. I. 17. Justinian afterwards allowed minors to manumit at the age of seventeen years, I. I. 6. 7, and ultimately withdrew all restriction, Nov. CXIX. 2.

² Hein. Ant. I. 7. 2.

³ C. VII. 3.

CHAPTER IV.

Of Citizens and Strangers.

THE second division of persons, in a civil consideration, is into citizens and strangers. This division is wholly omitted by Justinian in his *Institutions*. CHAP.
IV.

The persons subject to the Roman government were classed under four denominations. They were: 1. Cives. 2. Latini. 3. Italici. 4. Provinciales. Those who neither belonged to the city of Rome, nor to any state subject to the Romans, were called Hostes and Peregrini.

The *Institutes* of Gaius do not supply the deficiency of Justinian; and if the reader expects to be able to fix the exact confines of civil privileges which they possessed who were admitted to a partial citizenship, he will find himself often baffled in the attempt; because from the foundation of the city, when the patricians living within the walls were the only Cives Romani, to the time of Caracalla, when all who were in orbe Romano were declared to be citizens, the rights of citizenship were constantly extending.

Three things were necessary to constitute full citizenship: 1. Jus suffragii; the right of voting in the Comitia in passing laws, and electing magistrates.* 2. Jus connubii; the right of marrying a *Civis Romana* according to the prescribed forms. 3. Jus commercii; the right of trading freely, and enforcing contracts in the courts at Rome. The first approach to citizenship was the acquirement of the Jus commercii. This was early conceded to the Latini, and then to the Italici for the pro-

Citizen-ship.
*Jus Com-
mercii,
Connubii,
Suffragii.*

BOOK
I.

motion of commerce, and so would naturally lead to intermarriages, and the concession of the *Jus connubii*, whereby the children were recognised as legitimate. Last of all came the *Jus suffragii*, which right of course implied the other two.

*Leges Julia
et Plotia.*

If it be asked, what was the extent of civil privileges enjoyed by the *Latini* and the *Italici* respectively, it is difficult to answer the question with reference to any given period. We may venture to assert that before the *Leges Julia et Plotia*, the former of which passed in the year *u.c.* 664, and the latter in 665¹, the *Latini* had acquired the *Jus connubii*, while the *Italici* had probably only the *Jus commercii*, since *Livy* states that in the latter times of the Republic the *Latins* were admitted to full citizenship "*si stirpem domi reliquissent*," whence we may infer that the children were legitimate. The social war took place in the year *u.c.* 663. In the following year the *Latins* were admitted to the *Jus suffragii* by the *Lex Julia*; and in the year 665 this was extended to the Italian states by the *Lex Plotia*, excepting the *Samnites* and the *Lucani*; these last, however, were admitted in the year 670².

*Provinci-
ales.*

The *Provinciales* were the inhabitants of those districts which had been conquered by the Roman people, who, at the same time they were liable to pay such taxes as were imposed upon them, had no civil privileges whatever. They were governed by a *Præses*, or *Proconsul*, or *Proprætor*, who was sent annually from Rome by the Senate. They were ruled partly by laws passed at Rome, and partly by the edict of the *Præses* or *Proconsul*, which he published as soon as he entered upon his office.

*Præses.
Proconsul.
Proprætor.*

The term *Præses* was the *nomen generale* which included the *Proconsuls*, the *Proprætors* and their *legati* or deputies. The title of *Proconsul* was the

¹ *Haub* II. 40.

² *Liv.* xli. 8.

³ *Haub.* II. 40.

*appellatio specialis*¹. The Proconsul might assume the insignia of his office as soon as he left Rome, but as a general rule he could not exercise his authority till he entered his province². He was allowed six lictors³. If he returned to Rome, the moment he entered the city his *imperium* ceased⁴.

CHAP.
IV.

All who had no connexion with the Roman state were termed *Hostes* and *Peregrini*. With reference to Rome they had no civil rights and privileges, since by the law of the Twelve Tables, *adversus hostem aeterna auctoritas esto*.

*Hostes and
Peregrini.*

No one could be a citizen of Rome and of any other city at the same time.

This is a maxim of the Civil law. If any one allowed himself to be enrolled as a citizen of another state his Roman citizenship was thereby gone. "Duarum civitatum," says Cicero, "civis esse nostro jure civili nemo potest: non esse hujus civitatis civis, qui se alii civitati dicarit, potest⁵."

*One citizen-
ship abro-
gated
another.*

By a constitution of the Emperor Antoninus Caracalla, the privileges of a Roman citizen were conferred on all the inhabitants of every part of the Roman Empire who were *Ingenui*: and the same privileges were afterwards extended by Justinian to the *Libertini*.

In the year A.D. 242, the Emperor Caracalla⁶ conferred the right of citizenship upon all who were freeborn, thus abolishing the classes of the *Latini* and the *Dedititii*; but the distinction of the *Ingenui* and *Libertini* still continued. Finally, Justinian decreed that there should be no difference between the *Ingenui* and the *Libertini*, and a man was then "aut liber aut servus⁷."

*Caracalla.
Justinian.*

Of the states subject to the Roman Empire some were *Municipia*, others *Præfecturæ*, others *Coloniæ*.

¹ D. I. 18. 1.

² D. I. 16. 1.

³ D. I. 16. 14.

⁴ D. I. 16. 16.

⁵ Cicero *pro Balbo*, c. 11.

⁶ D. I. 5. 17.

⁷ C. VII. 6. 12.

BOOK
I.*Municipia.*

Municipia were those towns and districts which, having been annexed to the Roman Empire by conquest or otherwise, had had the rights of citizenship conferred upon them by the Senate. They who had acquired the right of Roman citizenship, but dwelt in their own towns, if they domiciled themselves at Rome, became *cives non optimo jure*; that is, they had all civic rights excepting the *Jus suffragii* and the *Jus honoris*. Aulus Gellius¹ states that while they used their own laws they were at liberty to adopt the laws of Rome. If they made a formal adoption of the Roman laws they became *citizens optimo jure*, and were said to be *fundi facti*². It was these whom Festus describes, *quorum civitas universa in civitatem Romanam venit*. There was also a third class, who at the same time they were in alliance with Rome were only governed by their own laws, and so were in no better position than the *Provinciales*³.

*Fundi facti.**Coloniae.**Decuma.*

When the Roman people conquered a territory they took to themselves a certain portion of the land absolutely, the rest they left in the possession of the inhabitants, imposing upon them the *decuma*, a yearly tax of the tenth of the produce. The land which they so reserved to themselves was usually colonized, which served as a check upon the natives of the district, and disposed at the same time of the surplus population of Rome. A law or *Senatusconsultum* first passed determining the amount of land, and among how many it was to be divided; appointing at the same time all the officials who were to assist in establishing the new community, the principal of whom were the *Duumviri*, or *Triumviri*, according as their number was, who were the governors, and represented the Consuls at Rome. The number of colonists being complete, with their full comple-

¹ Gell. *Noct. Att.* xvi. 13.² Hein. *Ant. App.* i. 5. 120.³ Id. 122.

ment of handicraftsmen, they went forth *sub vexillo*, a small square standard, probably bearing some device intended thenceforth to be the ensign of the community. Having arrived at their destination, a site for a town was chosen, and marked out, and each man had his portion of land assigned him by the Agrimentores¹. *sores*!

CHAP.
IV.

These colonies when so founded were either *Roman*. Roman, Latin, Italian, or military. Whether the Roman colonists possessed the entire rights of citizenship is a matter of dispute which cannot be accurately determined. The better opinion seems to be that they had not the Jus suffragii or the Jus honoris at Rome². The Latin colonists were at *Latin*. least *cives non optimo jure*; for if a Roman citizen joined a Latin colony he suffered the Capitis diminutio³, that is, he lost his citizenship. The Italian *Italian*. colonies were little better than the Provinciales. The chief difference seems to have consisted in the immunity of the former from certain taxes which were imposed upon the latter. The military colo- *Military*. nies consisted of those soldiers who from long service were entitled to their discharge, and had lands allotted to them on the frontiers called the *limitrophi fundi*⁴. These soldiers settled with their centurions and tribunes, preserving their military organization sufficiently to keep off any incursions of the hostes. They no longer dwelt in *castris* but in *pagis*, thence called *pagani*, which term *Pagani*. came to signify whatever was not military.

Those towns or districts which could not safely *Præfec-
tura*. be admitted into the class of municipia or coloniae, or having been so admitted had broken faith with the Republic, were governed by a Prefect sent annually from Rome⁵. Algeria might be taken as an instance of a modern Præfectura.

The *Civitates fœderatæ* were independent com- *Civitates
fœderatæ*. munities between whom and Rome there existed

¹ Hein. *Ant. App.* I. 5. 124; II. I. 2.

² Id. I. 5. 127.

³ See *post*, cap. 5.

⁴ C. XI. 59. 3.

⁵ Hein. *Ant. Ap.* I. 5. 132.

BOOK
I.

merely a *fœdus*, a treaty, according to circumstances, and they were so far from forming any part of the Roman state, that a citizen *aqua et igni interdictus* might take refuge among them¹.

¹ Hein. *Ant. App.* I. 5. 133.

CHAPTER V.

Of the Power of the Father.

THE third division of persons in their civil capacity is into *Patresfamilias* and *Filiifamilias*. CHAP.
V.

*Paterfamilias est qui in domo dominium habet*¹. The term *Patria potestas* signifies the power which a father had over his children, and all their descendants, and which only terminated with his death unless they had been duly emancipated. According to Ulpian it rested upon ancient custom². No one could be *paterfamilias* with respect to his own children unless he were *sui juris*; and whosoever was *sui juris* in a legal sense was *paterfamilias*. This right was peculiar to the Roman citizen, but Gaius states that the gens *Galatarum* exercised the same power³. *Paterfamilias.*
Patria potestas.

The Roman mother had no authority over the children, because she was *in manu mariti*, and was said to be *tanquam filia*. *Materfamilias.*

The *Filiusfamilias* was therefore he who was under the power of his *paterfamilias*, who might be his father, grandfather, or great grandfather. His position in the earliest times of the Republic was little better than that of the slave, for during the life of the *paterfamilias* he was entirely debarred the exercise of the *Jus civile privatum*: he could not be a party to a contract, nor could he make a will even with his father's consent; but the *patria potestas* did not exclude him from the *Jus publicum*, for he could be elected to any public office, or hold a command in the army. *Filiusfamilias.*
His position.

The above-mentioned disabilities arose from the *Unitas personæ* between the father and the *filii*. *Grounds of*

¹ D. L. 69. 195. 2.

² D. I. 6. 8.

³ Gai. I. 55.

BOOK
I.

son¹, the result of which was that no civil obligation nor contract could arise between them; and a man's children were considered as among the *res Mancipi*, or chattels of the Roman law, for if they were stolen, or detained by any one, he could in the former instance maintain an action for theft², or in the latter resort to the action of *vindicatio* to recover possession³.

*Reciprocal
duties of
parents
and
children.*

The *Jus Civile* of every country imposes reciprocal duties upon parents and children. The Roman father was bound to educate his children according to his rank and ability. He was not allowed to abuse the *patria potestas* nor to neglect the proper promotion of his children's welfare⁴.

Children were bound to support their destitute parents, but, according to Ulpian, were not liable for their debts⁵. This however could not have been the law in the early times of the Republic, because the acquisitions of the children were the property of the father.

*The power
of the
Father.*

The power of a Roman father consisted in three things: 1. He could put his child to death; which power formed a domestic tribunal in each family. 2. He could sell him three times. 3. Whatever the son acquired belonged to the father.

*1. Right of
life and
death.*

The father had the *Jus vitæ et necis* over the children; this right was absolute, and appears to have been coeval with the city; and was recognized by the Twelve Tables in these words, *Endo liberis justis jus vitæ et necis*. This right could not be exercised unless preceded by a solemn inquiry. A domestic tribunal existed in every family, where the father acted as judge, and the principal relations, the *agnati*, constituted the jury. According to their verdict the father punished the son. See the cases of Scaurus and Fulvius⁶.

*2. Right of
selling
three times.*

Before the law of the Twelve Tables the father's

¹ I. I. 9. 2.

² D. XLVII. 2. 14. 13.

³ D. VI. 1. 1. 2.

⁴ D. XXIII. 2. 19.

⁵ D. XXV. 3. 5. 16.

⁶ Hein. *Ant.* I. 9. 5.

right of selling the son appears to have been unlimited; for if the son were sold and emancipated by his purchaser, he immediately became again the property of his father. The Twelve Tables contain this provision, *Si Pater filium ter venumduit filius a patre liber esto*. After three sales therefore he was entirely emancipated. One sale only was necessary for the emancipation of a grandson or daughter. The reason of the former it is difficult to explain satisfactorily, because the *patria potestas* extended with equal force to the grandson as to the son. That of the latter is evident, because the daughter by marriage passed entirely out of her father's family, and was either *in manu mariti*¹ or in the *patria potestas* of the husband's father, and a second sale would therefore have interfered with the legal rights of another.

CHAP.
V.

Whatever the *filiusfamilias* acquired belonged to the father². This was the necessary result of the *Unitas personarum*. The son could possess nothing but his *peculium*³. Whatever therefore he might gain vested in his father. The law of England furnishes a parallel case as between husband and wife; whatever is acquired by the wife belongs to the husband, except it be vested in trustees to her separate use. This power was gradually reduced and extinguished.

³ What the son acquired belonged to the father.

The rigour of the *patria potestas*, originating in an age of barbarism, naturally and necessarily gave way before the advance of civilization, and the development of the *Jus Civile*. The Emperor Trajan compelled a Father to emancipate his son because he had treated him with extreme severity; and, on the death of the son, would not allow the father to succeed to his property⁴. A father killed his son when out hunting, because he suspected him of having committed adultery. Hadrian banished the father. Lastly, in the reign of Valen-

How restrained, and ultimately extinguished.

¹ See post. ch. 6.

² I. II. 9; Gai. II. 86, 87.

³ See post. book II. ch. 4.

⁴ D. XXXVII. 12. 5.

BOOK I. tinian, A.D. 369, nothing was left to the father but the right of moderate chastisement¹.

How terminated.

The natural death of the father, and the civil death of either father or son, put an end to the patria potestas².

Capitis diminutio.

When the paterfamilias died his sons who were not emancipated, and his daughters who were unmarried, became *sui juris*. The civil death of either father or son also extinguished the patria potestas, because this being a right peculiar to the Roman citizen, the loss of citizenship extinguished the right. Civil death, or capitis diminutio, which is defined as *Status permutatio*³, was of three sorts: 1. Maxima. 2. Media. 3. Minima⁴. The first involved the loss of liberty, citizenship, and family, as, where a man was taken prisoner in war, or was condemned to slavery for his crimes. The second was, where citizenship was forfeited, but liberty retained, as in the case of those who became *exccules*, being denied the use of fire, water and lodging, or who were *deportati in insulam*. The third related to the loss of family only, as in arrogation⁵. Any one of these would obviously put an end to the patria potestas: the name of the party was struck out of the census, —hence the term Capitis diminutio.

Jus Postliminii.

If the father were taken captive his power was suspended during his captivity, and on his return revived by what was called Jus Postliminii⁶. If a Roman citizen were taken prisoner in war his rights were not thereby extinguished; for, inasmuch as he might return, it was held that, so long as he lived, they were only in abeyance, and that on his return they revived by the *Jus Postliminii*, which may be said to be the right of recovering that *status*, and those possessions which have been lost in war. The operation of this right was retrospective, for if the party died in captivity, or in exile, his death was

¹ D. XLVIII. 9. 5.

² D. IV. 5. 1.

³ Hein. *Ant.* I. 16. 10. 11.

⁴ C. IX. 15. 1.

⁵ D. IV. 5. 11.

⁶ See *post.* ch. 8.

dated from the day when either of these commenced; if he returned then it was considered he had never been absent. As an example, a modern instance may be seen in the case of King Charles II. The first year of his actual reign is styled the twelfth; had he died in exile his death, *qua* king, would have dated from the time that his exile began.

CHAP.
V.

The father could put an end to his power by emancipation.

We have seen that the *patria potestas* was perpetual, and only terminated by death natural or civil. Tenacious as the old Romans were of this power, many cases might still arise in which it would be convenient or just that the father should put an end to it, and make his son *sui juris*. The ceremonial by which this was done was one of the *actiones legis* framed by the Jurisconsulti, and based upon the Twelve Tables. The law was this: *Si pater filium ter venumduit filius a patre liber esto*: consequently, if there were three sales, and three manumissions, the son was for ever free from his father. The ceremony was performed before some magistrate *apud quem legis actio est*¹, i. e. who had cognizance of the case. There were present the father and son, the *Paterfiduciarius*, the fictitious buyer, the *Libripens* who held the scales², five Roman citizens as witnesses, and the *Antestatus*, a public officer who summoned them. The natural father then said to the *Paterfiduciarius*, *Mancupo tibi hunc filium qui meus est*, who immediately took hold of the son, replying, *Hunc ego hominem, ex jure Quiritium, meum esse aio, isque mihi emptus est hoc ære, hac æneaque libra*, and he then delivered the sesterrium to the father, whereby the son became his property, and he immediately manumitted him with the usual forms, whereby he again fell back into his father's power. This being

Emancipation.
A
legis actio.

The ceremony.

¹ D. I. 7. 4.

² The office of the *Libripens* was to weigh the metal before a coinage existed; his presence afterwards appears only a useless form.

BOOK
I.*The antestatio.**Pactum
Aducia.**Anastatius.**Justinian.*

repeated three times the son became *sui juris*. At each sale the Antestatus stepped forward and touched the ears of the witnesses, saying, "Memento ut in hac re mihi testis eris."

At the third sale the father added the *pactum fiducia* for the purpose of securing his rights as quasipatronus, thus: *Mancupo tibi hunc filium qui meus est, ea conditione ut mihi emancupes, ut inter bonos bene agier oportet, ne propter te tuamque fidem frauder.* When the Paterfiduciarius, therefore, had made the third purchase, with this condition annexed, he did not manumit the son, but he handed him back to his father, from whose hand he received his ultimate freedom, thus securing to himself the *jura patronatus*, which might otherwise have been claimed by the Paterfiduciarius.

In the year A.D. 503¹ the Emperor Anastatius decreed that the above ceremony should be discontinued, and that the Rescript of the emperor, duly published, should constitute a legal emancipation of a son under power.

Justinian afterwards ordained², that if the father appeared before the magistrate he might, with the consent of the son, declare him emancipated. The form was this: *Hunc sui juris esse patior, meaque manu mitto*³.

Even when the patria potestas existed in all its rigour, if a son rose to a command in the army, or was elected a magistrate, he was practically emancipated, though legally he was sub patria potestate.

¹ Haub. II. 91. C. VIII. 49. 5.

² C. VIII. 49. 6.

³ Hein. Ant. I. 12. 14.

CHAPTER VI.

Of Marriage.

"THE patria potestas was acquired three ways: 1. By lawful marriage. 2. By Legitimation. 3. By Adoption." CHAP. VI.

The primary foundation of the patria potestas was a legal marriage; otherwise the children were illegitimate, and sui juris. *In potestate nostra sunt liberi nostri quos ex justis nuptiis procreavimus*¹. *Patria potestas, how acquired.*

Nuptiæ and matrimonium were different. The solennes nuptiæ of the Romans were completed Farre, Coemptione, Usu; and might be dissolved Diffarreatione, Remancipatione, Usurpatione.

*Nuptiæ sunt conjunctio maris et feminae, et consortium omnis vitæ: divini et humani juris communicatio*². The union of male and female with the intention of cohabiting during their joint lives, and an equal participation in rights divine and human. The marriage might be dissolved by divorce. The woman, if she came *in manu mariti*, was entitled to a full participation in the *sacra privata*, the right of sacrificing at the domestic altar; of succeeding jointly with the children as heir to the husband, if he died intestate; and also of sharing in his rank and dignity. The difference between *nuptiæ* and *matrimonium* was this: *nuptiæ* signified the marriage ceremony, called also *Ritus nuptiarum*: *matrimonium* was the married state, and applied to peregrini as well as citizens; but since *nuptiæ* were the *divini et humani juris communicatio* it followed that there could be no marriage, i. e. no *connubium* between Romans and peregrini. *Connubium est jure ducendæ uxoris* *Nuptiæ.*
Matrimonium.
Connubium.

¹ I. I. 9.

² D. XXIII. 2. 1.

- BOOK I. *facultas*¹. Before the marriage came the *Sponsalia*, which was a previous contract requiring only the consent of both parties, *per verba de futuro*², and is defined to be *mentio et repromissio nuptiarum futurarum*³. The consent must be perfectly free⁴; any undue coercion by the paterfamilias would render it void. This contract might be dissolved on either side. Such dissolution was called Repudium, and was effected by these words, *Tua conditione non utor*⁵.
- Sponsalia.*
- Repudium.*
- Subsequent to the *Sponsalia*, when the *Dos* had been agreed upon, and when the *tabulae nuptiales*, the marriage settlements, had been executed, the *Ritus nuptiarum* took place. Without this there was no marriage, it being an established principle of the Roman law that, *Iustum conjugium consensu solo contrahi non potest*.
- Ritus nuptiarum.*
- Confarreatio.*
- The most ancient form of marriage appears to have been that which was performed *Farre*, or *confarreatione*, so called from the *panis farreus*, the cake, of which both parties partook. This was a religious ceremony. Ten witnesses were present, a sheep was sacrificed, and the man and woman were united by the priest by a set form of words⁶. The effect of this ceremony was that the wife came *in manu mariti*, and so was entitled to a full participation in the *Jus divinum* and *humanum*. The children born of this marriage were called *Patrimi* and *Matrimi*, from whom only the Flamens and vestal virgins could be chosen. This ceremony continued in use in the time of Gaius, but it soon after became obsolete, probably on account of the expense and the difficulty of obtaining a divorce. Heineccius states⁷, on the authority of Tacitus, that in the time of Tiberius only three candidates for the office of Flamen could be found born of parents united by this form.
- Patrimi and Matrimi.*

¹ Ulp. *Frag.* v. 3.² *D.* xxiii. 1. 4.³ *D.* xxiii. 1. 1.⁴ *D.* xxiii. 1. 13.⁵ *D.* xxiv. 2. 2. 2.⁶ Gai. 1. 112. Hein. *Ant. de Nuptiis*.⁷ Hein. *Ant.* 1. 10. 9.

The second form was *Coemptio*, which existed long after *confarreatio* had fallen into disuse. This was a legal contract in which the woman was mancipated under the form of a fictitious sale. No evidence remains of the exact ceremony by which it was effected, and which may be presumed to have taken place before the *Sponsa* left her father's house. Nor must it be supposed from the term *coemptio* that it was a reciprocal purchase; that was legally impossible, because the wife became the property of the husband, and all that she might acquire vested in him. When the *domum ductio*¹ took place the *emptio* by the *sponsus* must have been completed. The bride on that occasion had with her three *asses*; one she delivered to her husband as typical of her *Dos* which she brought with her, the second she placed upon the domestic altar as an offering to the household gods, and the third she laid before the *Lar* which stood in the street². The result of this ceremony was that the wife was *in manu*, or *in potestate mariti*; she passed out of her father's family into that of her husband, became *materfamilias*, and was entitled to share in his property equally with the children in case he died intestate.

The third form of marriage was that which was accomplished by *Usus*. If a woman went with the consent of her parents or guardians to cohabit with a man, *matrimonii causa*, and she remained with him without being absent three nights during the year, she then became his wife *usucapione*³, because, as his possession of her was *bona fide*, the prescription being complete, she was then in *dominio quiritorio*⁴, and became *materfamilias*. Until the year had expired she could only be *in bonis*, and was styled *matrona*, being still a member of her father's family. If she absented herself for three nights, *trinodium*, and

CHAP.
VI.*Coemptio.**Usus.*¹ See *post*.² *Gai.* I. 110.³ *Hein. Ant.* I. 10. 11. *Colq.* I. 558.⁴ *Vid. post.* book II. *Tit. Prescription.*

BOOK
I.

so long as she might continue to do so, she broke the continuous cohabitation, and was *matrona*, not *materfamilias*; and had no claim to her share of her husband's property on his decease. It must be observed that this form of marriage did not in any way affect the children who were legitimate and in *patria potestate*. If the woman did not absent herself during the entire year she became *materfamilias*, and entitled to all her rights as such. This form of marriage was as old as the Twelve Tables¹.

*Ritus Nuptiarum.**Domum ductio.*

In the case of a marriage contracted by *Usus*, it does not appear that there was any formal *domum ductio*. It was probably adopted by the poorer classes to avoid expense, and where, perhaps, the man had no house; but it is not to be inferred that it was without sufficient notification to constitute the *Ritus nuptiarum*², which was the public solemnization of the marriage, and consisted in the *domum ductio*, which took place after sunset. The *sponsa* was conducted from the house of her father to that of her intended husband, accompanied by a procession of boys and girls, with music and singing, some of the party carrying torches. The *sponsus* met her at the door, received her with fire and water, and gave her the keys, as emblematical of her future authority in the house. She was then *uxor*, *quamvis nondum in cubiculum mariti venerit*³. The *ductio* must be to the house of the husband, and might take place in his absence⁴.

*Diffarreatio.**Remancipatio.*

Each of the solemn forms of marriage had its corresponding form of divorce. That which was contracted by *Confarreatio* was dissolved by *Diffarreatio*, which was a religious ceremony, no account of which remains. Plutarch⁵, speaking of the priests who were present, says, *Multa horrenda, inaudita et tristia fecerunt*. The marriage contracted by *Coemptio* was dissolved by *Remancipatio* :

¹ Vid. Tab. vi. Bach. XXIX.² C. v. 4. 9.³ D. XXXV. 1. 15.⁴ D. XXIII. 2. 5.⁵ Quæst. Roman. L.

*Omnia quæ jure contrahuntur, contrario jure pereunt*¹, and, therefore, we may conclude that the wife was remancipated to her family in the presence of seven witnesses.

CHAP.
VI.

In the case of *Usus* the marriage was dissolved *Usurpatio*. *Usurpatio*. We have seen that the absence of the wife from the husband's house for three nights in the course of the year, caused her still to continue a member of her father's family, so ceasing to cohabit would dissolve the marriage.

Before the Twelve Tables the power of divorce *Divorces, and grounds of* was given to the husband only, and the grounds appear to have been adultery, preparing poisons, *it.* and the falsification of keys. The Twelve Tables gave the reciprocal right of divorce, augmenting the grounds upon which it was allowed. What those grounds were is uncertain; but the case of Carvilius Ruga goes to shew, that parties were strictly confined to the causes mentioned. "The tradition," says Dr Hallifax, "that there was no instance of a divorce in Rome till the year of the city 525, is at least a questionable piece of history." He here alludes to the case of Spurius Carvilius Ruga, mentioned by Aulus Gellius². *Case of Ruga.* Dr Colquhoun³ has clearly disposed of this difficulty. Ruga wished to divorce his wife on account of sterility; this not being a legal ground of divorce, he was bound in such a case to give one half of his property to the woman, and to dedicate the other half to Ceres. On application to the Censors he was allowed his divorce and excused the mulct to Ceres, thus saving half the fine. In short, it was the first divorce known in Rome for the cause of sterility.

Divorces were, 1. *Bona gratia*. 2. *Mala gratia*.

A divorce *Bona gratia* was allowed by mutual *Bona gratia.* consent without stating any grounds⁴.

The divorce *Mala gratia* was founded upon the *Mala gratia.*

¹ D. L. 17. 100.

² Gell. IV. 3.

³ 654, 655.

⁴ D. XXIV. 1. 62. C. V. 17. 9.

BOOK I. complaint of one of the parties; and there appears to have been, in the time of Justinian, six causes

Grounds of divorce. allowed on the part of the husband: conspiracy, adultery, attempting the life, absence from home without permission, attending public theatres, and assignations. The causes allowed on the part of the wife were five: attempting her life, attempting to prostitute her, false accusation of adultery, intimacy with other women, and treason¹.

But it appears from the *Digest*, that divorces were allowed on the most trivial grounds, such as entering the priesthood, sterility of the wife², also old age, ill health, or entering the army; and the reason assigned is, because in such cases *satis com- mode retineri matrimonium non possit*³.

Form of divorce. The usual manner of effecting a divorce in the time of the Empire was by a written declaration, a *libellus*, delivered by the *libertus* in the presence of seven witnesses⁴. If the forms were not duly observed the divorce was void⁵.

Consent must be free. When the marriage-contract is said to be formed by consent alone, it was supposed to be such a consent as excluded, not only error and fraud, but force and fear. The rule was, that "*Nuptiæ consistere non possunt, nisi consentiant omnes, id est, qui coeunt, quorumque in potestate sunt*"⁶. Any coercion on the part of the *paterfamilias*, exceeding his legitimate authority, would render the marriage void. "*Non cogitur filius familias uxorem ducere*"⁷; and since marriage is a solemn contract, anything like force and fear⁸, or error⁹ and fraud, must make it invalid.

As to the marriage-contract being formed by consent alone, it must be understood that the mere consent of the parties could never constitute a

¹ *N. OXVII. 8. 14.*

² *D. XXIV. 1. 61.*

³ *D. XXIV. 1. 35.*

⁴ *D. XXIII. 2. 21.*

⁵ *D. L. 17. 116. 2.*

⁶ *D. XXIV. 1. 60. 1.*

⁷ *D. XXIV. 2. 9.*

⁸ *D. XXIII. 2. 2.*

⁹ *D. L. 17. 116.*

valid marriage. Ulpian says, "Nuptias non concubitus sed consensus facit¹;" but he also states² that the marriage is not complete without the *Do-*
mum ductio, the solemnization, the consent being expressed *per verba de præsenti*. CHAP. VI.

"The impediments to a just marriage by the Roman law were: 1. Nonconsent of the paterfamilias. 2. Want of age. 3. Want of citizenship. 4. Natural defects of mind and body. 5. Consanguinity. 6. Affinity." Impediments.

1. Nonconsent of parent. Whenever one of the parties was not *sui juris* the consent of the paterfamilias was indispensable³. If he were insane, or a prisoner of war, the children might marry after three years⁴; and within that period provided the alliance were such as the father could not reasonably object to⁵. But parents were not allowed to withhold their consent wantonly to the prejudice of their children, for, by the *Lex Julia* and *Papia*, if they did not take all due means to promote their settlement in life, the children had redress upon application to the *Prætor*⁶. Nonconsent of Pat. fam.

2. The Civil law fixed the age of puberty at fourteen years in males, and twelve in females. A marriage therefore must be incomplete if either of the parties were under the required age, because consummation in that case could not be presumed. If a marriage took place before the age of puberty, and neither repudiated the contract at that period, it then became valid⁷. Want of age.

3. Unless there were the *Jus connubii* there could be no Roman marriage. This is defined by Ulpian to be *Uxoris jure ducendæ facultas*⁸. The want of citizenship was therefore a bar to a legal marriage, and its consequent privileges. Want of citizenship.

¹ D. L. 17. 30.

² D. XXXV. 1. 15; and see Gothofred's note to this law.

³ D. XXIII. 2. 3, and 18 and 25.

⁴ D. XXIII. 2. 9 and 10.

⁵ D. XXIII. 2. 11.

⁶ D. XXIII. 2. 19.

⁷ D. XXIII. 2. 4.

⁸ Ulp. Fr. v. 3.

BOOK
I.Natural
defects of
mind and
body.

4. Infirmary of mind might preclude the consent required by law, that of body might render cohabitation impossible; and without both these there was no marriage.

5. In the right line marriages were prohibited in *infinitum*, whether the relation of parent and child were derived from nature, or introduced by adoption, according to the Roman law¹, and that dissolved.

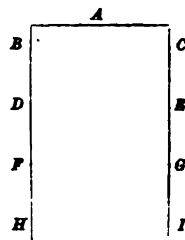
Consan-
guinity.

Consanguinity, that is relationship by blood, is computed by degrees and lines, counting from the progenitor, or common ancestor. A degree is the distance between any two persons in the line. The line is either right or oblique, or more properly speaking collateral. The right line represents all our ancestors, or all our posterity according as we count upwards or downwards. The collateral line represents the relatives of the right line, and *vice versa*.

Rules for
computing
degrees.

The rules for computing degrees of consanguinity in the right and oblique (collateral) lines, by the Civil, Canon, and English laws.

Let *A* be the common ancestor, *B* and *C* his two sons. Then *A, B, D, F, H*, is a right line: so also is *A, C, E, G, I*. The collateral line consists of any part of the two right lines concurring in the common ancestor *A*: thus *F, D, B, A, C, E, G* is a collateral line.

In the
right line.

The mode of counting degrees in the *right line* by the Civil, Canon, and English laws are the same. Thus from *A* to *B* is one degree; from *B* to *D* is two degrees, &c. Marriages are prohibited in this line *ad infinitum*, i.e. I cannot marry my mother, nor her mother, and so upwards to Eve; nor can I marry my daughter, nor her daughter, and so downwards for ever. In the collateral line the Civil and the English laws follow the same

In the col-
lateral line.

¹ Vid. *post.* chap. 8.

mode of computation, omitting the common ancestor, e.g. *D* and *E* were first cousins, the grandchildren of *A*, and are four degrees from each other, thus *D*, 1, *B*, 2, omit *A* common ancestor; *C*, 3, *E*, 4. So *F* and *E* will be in the fifth degree, *F* and *G* in the sixth, and so on.

CHAP.
VI.

The Canon law counts one line only, stopping at the common ancestor, and distinguishing between the *equal*, and the *unequal* collateral line. As regards the equal collateral line it has this rule: "As far as either of the parties are from the common ancestor so far are they from each other." Let *F* and *G* be the parties, then since they are each three degrees from the common ancestor *A*, they are therefore three degrees from each other. Next with respect to the unequal collateral line the rule is this: "As far as the farther of the two is from the common ancestor so far are they from each other." Let *F* and *E* be the persons, then since *F* is three degrees from the common ancestor, *F* is three degrees from *E*. By the same rule *F* is three degrees from *C*, consequently according to the Canon law *F* is related in the same degree to the nearer as to the more remote relative: or, to take a stronger case, *H* stands in the same degree of relationship to *C*, *E*, *G*, and *I*; a mystery we do not pretend to unravel.

Rule of the
Canon
Law.

The general rule concerning marriages prohibited on account of consanguinity and affinity, is that all such as are real parents and children to each other, or in the place of parents and children, are forbidden to marry together, whether the relation of parent or child were derived from nature, or introduced by adoption, and that dissolved.

Marriages
prohibited.

Besides those who were real parents and children, standing in the right line, and so prohibited from marrying *ad infinitum*, there were those *qui parentum liberorumve locum inter se obtinent*¹, and this relationship arose either by marriage, or adop-

¹ I. i. 10. 1.

BOOK
I.

tion, e.g. the widow of a great grandfather, and a daughter adopted and afterwards emancipated¹.

In the oblique line, marriages of brothers and sisters of the whole blood, or half, natural or adopted, while the adoption continued; as also of uncles and nieces, and of aunts and nephews, were forbidden: and from the time of the Emperor Claudius to that of Constantine the marriage of a brother's daughter had been allowed.

Marriages within the fourth degree forbidden.

In the collateral line the Civil law permits marriages in the fourth degree, but not *within* it, first cousins being the nearest relatives who can marry; uncles and nieces, aunts and nephews are therefore excluded, as being in the third degree. Claudius, wishing to marry his niece Agrippina, legalized this marriage by a *Senatusconsultum*².

Levitical law.

Theodosius forbade the marriage of first cousins, but Arcadius³ allowed it, and finally, the marriages of first cousins, which at different times had been both allowed and forbidden by the emperors before Justinian, were by him declared to be lawful⁴. The Levitical law follows the same rule⁵.

Affinity.

The marriage of a great aunt, or the widow of a great uncle, though forbidden by the Roman is allowed by the English law. Marriages were forbidden by the Roman law where the parties were *in loco parentum aut liberorum*⁶, but if they be in the fourth degree the English law offers no objection. Marriages in the right line were forbidden on account of affinity no less than consanguinity. In the oblique line the old Roman lawyers compared affinity with adoption, and made the same rules govern both; but the constitutions of the emperors forbade marriages of persons related by affinity in this line⁷.

Comprivigni.

Comprivigni, or children by former marriages of a husband or wife, might marry together. There

¹ Id.

² Colq. i. 626.

³ C. v. 4. 19.

⁴ I. i. 10. 4.

⁵ Numb. xxxvi. 10, 11.

⁶ I. i. 10. 5, 6, and 7.

⁷ Id. et vid. Gai. i. 59.

are no degrees of affinity; and though the children of former marriages would be stepchildren to the husband and wife respectively, still no affinity would be created between themselves by the inter-marriage of their parents, and therefore they might marry together.

CHAP.
VI.

The prohibitions of marriage on account of consanguinity and affinity extended equally to freemen and slaves; that is to say, parties duly emancipated could not marry together if they came within the prohibited degrees¹. The laws concerning second marriages prohibited the woman from marrying again during the *annus luctus*, which was at first ten months, afterwards extended by Justinian to twelve: the reason of this prohibition was *propter perturbationem sanguinis*², to prevent the confusion of families. If a widow transgressed this law she became infamous, *nota infamia*. A widower might marry as soon as he chose³.

Slaves.
Second marriages.

The effects of the marriage are, 1. Common to husband and wife. 2. Peculiar to one only.

Effects of marriage.

The effects common to both were the mutual obligation to conjugal fidelity and constant cohabitation. The husband was entitled to obedience and respect from the wife, who was obliged to discharge all her domestic duties; he had the *patria potestas* and the right to the management of his wife's property, and was bound to appear for her in all questions concerning it⁴. The wife was entitled to the husband's protection⁵ and maintenance, and to share in his dignity and honours; which rank she retained during her widowhood⁶.

Polygamy was condemned by the Roman law during the Republic and by the constitutions of the emperors. Nothing appears in history to show that polygamy was countenanced during the Republic. Diocletian⁷ and Valentinian⁸ denounced

Polygamy.

¹ I. I. 10. 10.

² D. III. 2. 11. 1.

³ D. III. 2. 9.

⁴ C. II. 13. 21.

⁵ D. XLVII. 10. 2.

⁶ C. X. 39. 9.

⁷ C. V. 5. 2.

⁸ C. IX. 9. 18.

BOOK
I
*Concubin-
age.*

it as infamous, and Justinian declared that "*duas uxores eodem tempore habere non licet*¹."

Concubinage was recognized by the law, and was a universal practice². It was defined as "*vir unius cum una muliere consuetudo legibus non incognita*³;" and it was regarded as a *licita consuetudo*.

Fornication does not appear to have been censured, but by the old law concubinage was in certain cases considered disgraceful, as where a son took his father's concubine, or vice versa⁴. Constantine forbad concubinage in the case of a married man⁵; so also did Justinian, declaring that it had always been forbidden in such cases, which regulation he confirmed⁶.

¹ *I. I. 10. 6.*

² *D. XXV. 7.*

³ *Paul. Sent. II. 20. 1.*

⁴ *D. XXV. 7. 4. 3.*

⁵ *C. V. 26.*

⁶ *C. VII. 15. 3.*

CHAPTER VII.

Legitimation.

LEGITIMATE children were those born in lawful wedlock, all others were considered as illegitimate. CHAP. VII.

Illegitimate children were of four sorts: 1. *Illegitimate children. How classed.* Natural children, or those born in concubinage. 2. Spurious and vulgo quæsitæ. 3. Filii adulterini. 4. Incestuosi. The first of these were the only objects of legitimation.

Natural children, also called *nothi*, were the children of the concubine or mistress, who, as we have seen in the last chapter, stood in all respects in the place of a wife without her dignity and privileges. The *spurii*, called also *vulgo quæsitæ*, were the offspring of casual sexual intercourse. A distinction is drawn between them, the former signifying the natural children of a woman *honestæ æstimationis*; the latter those of a common strumpet. The *adulterini* were the natural children of a married woman, and the *incestuosi* where the parents were within the prohibited degrees of consanguinity.

Legitimation was procured three ways: 1. By a subsequent marriage. 2. By the natural son being made a decurion. 3. By rescript of the emperor.

*Legitimatio est actus quo liberi illegitimi fin- Legiti-
guntur ex justo matrimonio nati, et hinc instar legi- matio.
timorum rediguntur in patriam potestatem*¹. The legitimation by subsequent marriage had its origin *Per subse-
quens ma-
trimonium.* with the Emperor Constantine, who, having embraced Christianity, naturally discountenanced a practice contrary to Christian morality: but he

¹ Hein. *El.* 166.

BOOK
I.

had to contend with a long established practice—*licita consuetudo*—*legibus non incognita*—and therefore he decreed by a constitution¹, A.D. 334, that to those marrying their concubines the rights of the *patria potestas* should be conceded, and the children begotten in concubinage be considered as legitimate from the moment of their birth. This constitution was afterwards repeated in the year A.D. 476 by the Emperor Zeno². The parties must be capable of marrying at the time of the birth of the children; for if a man had illegitimate children by his female slave and afterwards manumitted and married her the children were not legitimate, but only became *liberti*³.

Per oblationem curiæ.

Theodosius the younger decreed, A.D. 443, that if a bastard would undertake to fill the office of a *decurio* he should thereby become legitimate. A *decurio* was the member of the *curia*, the legislative assembly of a province. The duties of a *decurio* were very onerous and accompanied with great risk, and it often became difficult to get any one to undertake the office. If a natural daughter married a *decurio* she thereby became legitimate⁴. The Emperor Anastasius afterwards decreed A.D. 558, that bastards might be legitimated by *arrogation*⁵, i.e. by being adopted by the natural father with the prescribed ceremonies. We may however assume from the antiquity of *arrogation*, and its legal consequences, that natural children were legitimated in this way before the constitution of Constantine.

Per rescriptum principis.

This was introduced by Justinian, but he provided that this should only have legal effect when the legitimation could not be accomplished otherwise, as in case of the death of the mother of the children, or she having married a man who was not the father of the bastard in question⁶. He

¹ Haub. II. 77.

² Colq. 673.

³ Vid. *post*, cap. 8.

⁴ C. v. 27. 5. and Haub. II. 89.

⁵ Colq. 661.

⁶ N. 89. 9.

also introduced another mode of legitimation, where a father expressed his desire in his will that his natural sons should succeed him as legitimate; in such case the will of the father might be confirmed by rescript¹. CHAP.
VII.
Per testamentum.

The result of illegitimacy was the incapacity to inherit, and that illegitimate children were *sui juris*. The effect of legitimation was that the children acquired the rights of family, and of inheritance; the father the *patria potestas*, and the *jus acquirendi per liberos*. Connected with this subject stands the Edict of the Prætor *de inspiciendo ventre custodiendoque partu*². *Edict de ventre inspiciendo.* If a man died intestate leaving a widow who declared herself to be pregnant the child would be his *suus heres*. It therefore became necessary to prevent the possibility of the agnati being defrauded of their rights by the imposition of a child either not born of the widow, or so born as to be illegitimate. This was done by the Prætor's Edict, "*De ventre in possessionem mittendo et curatore ejus.*"

¹ Id. 10.

² D. xxv. 4. 10. 1.

CHAPTER VIII.

Adoption.

**BOOK
I.**

ADOPTION was the third method of acquiring the patria potestas; and appears to have originated in the anxious desire always exhibited by the Romans to preserve the *gens* and the *sacra privata* from extinction.

*Adoptio
definition.*

*Adoptio est actio solennis qua in locum filii vel nepotis adsciscitur is qui natura talis non est*¹.

Arrogation.

Adoption was of two kinds. First, *Arrogation*, which concerned those only who were *sui juris*; and secondly, *Adoption*, which referred to those who were in the power of their parents. We will first describe the ceremonies attending each of these, and then point out the legal effects. *Arrogation*, so called from the *adrogatio ad populum*, took place before the *Comitia*, like the early wills of the Romans, and probably for the same reason, viz. that it was a transfer of the legal inheritance from the direct line; it also involved the *capitis diminutio* of the party adopted, and therefore by the Twelve Tables must needs be done by a *lex curiata*².

*How
effected.*

The assistance and authority of the Pontifices was requisite in this ceremony. It was their duty to ascertain the reciprocal assent of the parties, and that none of those legal impediments existed which we will presently describe. No objection being alleged the *solennis rogatio* took place in this form: *Velitis jubeatis Quirites, ut L. Valerius L. Titio tam jure legeque filius sibi siet, quam si*

¹ Hein. *El.* 175.

² Hein. *Ant.* I. II. 6. and Gai. I. 94—107.

*ex eo patre matreque familias ejus natus esset, &c. ita vos Quirites rogo*¹. We may presume that such a note passed as a matter of course, for it would seldom happen that any one was interested except the parties concerned.

CHAP.
VIII.

The person adopted in this case passed, together with his children, if he had any, entirely into the family of the adoptor, to whom he became *filius familias*. He underwent the *Capitis diminutio minima*, and lost the agnate rights of his own family. As adoption did not confer the *jus sanguinis*, he therefore did not become *cognatus* to the *cognati* of the adoptor². All his property, rights and liabilities vested in the adoptor, and he so remained till the death of the latter, who might emancipate him if he chose, but in that case must place him in the same position as he found him. Arrogation could only take place at Rome, because there only the *Comitia* could be held; and none could give himself in arrogation who was the last of his family, for it was not allowed to continue one family by the extinction of another³.

Adoptio, as distinguished from Arrogatio, concerned those only who were in *patria potestate*, and it was either *plena*, or *minus plena*. When a father gave his child in adoption to the maternal grandfather of such child; or when a father who had been previously emancipated gave his child in adoption to his own father; in short, when a person in *patria potestate* was adopted by either of his grandfathers, this was *plena adoptio*, because the *patria potestas* passed from the father to the grandfather. If the child were given in adoption to a stranger it was *minus plena*, because the child remained in the power and *domicilium* of the father; and the only result was that if the adoptor died intestate the adopted party succeeded as his heir. This kind of adoption was effected three ways: 1. Per æs et libram. 2. Per

*Adoptio
plena and
minus
plena.*

*How
effected.
1. Per æs et
libram.*

¹ Hein. Ant. I. 11. 10.

² D. I. 7. 23.

³ Cicero pro Domo.

BOOK I. testamentum. 3. Per Præto- rem. In the first case the ceremony was in all respects the same as in the emancipation of a son¹. The father sold his son three times to the adoptor, in the presence of five witnesses, the Libripens and Antestatus, and the adoptor emancipated him *twice*, consequently after the third sale he became and remained the property of the adoptor².

*Per testa-
mentum.* In adoption by testament it was nothing more than an injunction imposed by the testator on the heir named in the will to assume his *name* as well as his property, but as it did not confer the full rights of adoption it was generally repeated before the *Comitia* or *per æs et libram*³.

*Per Præ-
to-rem.* The third form was *apud Præto-rem*⁴, by the *cessio in jure*⁵. In the presence of the Prætor or Præses provincie the adoptor claimed the child,

*Justinian's
alteration.* and the father who was present, not opposing the claim, it was allowed. Justinian reduced the whole of these to a simple declaration before a magis-
*Adoptio
imitatur
naturam.* trate⁶. It was a maxim that *adoptio imitatur naturam*, from which no deviation was permitted.

*Impedi-
ments.* They only could adopt who were in a situation to be parents. A *spado*⁷ might adopt because his incapacity to procreate was considered curable, but not a *Castratus*, nor an *Impubes*, nor a woman, because she could have no children in her power. No one could adopt another older than himself⁸, but the adoptor must be 18 years older than an adopted son, and 36 years older than an adopted grandson, because a son of full puberty was supposed to have begotten him⁹. Men under the age of 60 years were not allowed to adopt, because before that time it was considered they might have issue of their own bodies¹⁰. Persons who had children might adopt, but this was not readily

¹ See *ante*, chap. 5.

⁴ Gai. I. 98.

⁶ C. VIII. 48. 11.

⁹ D. I. 7. 40. 1.

² Hein. *Ant.* I. 11. 15.

⁵ Gai. I. 134. and D. I. 7. 4.

⁷ D. I. 7. 40. 2.

¹⁰ D. I. 7. 17. 2.

³ Id. I. 11. 18.

⁸ I. I. 11. 4.

granted, as it must be to the manifest injury of the children, nor was it any great advantage to the adopted party. If a man wished to adopt a grandson who had a son he must obtain the consent of the latter¹.

CHAP.
VIII.

A person arrogated became a part of the arrogator's family as much as if he had been begotten by him; all the property of the person arrogated immediately vested in the arrogator; and should the latter die intestate, with no children to interfere with the arrogatee he received back his property, and succeeded to the entire effects of the arrogator.

Legal consequence of
Adoption.

In the case of *adoptio minus plena* the legal effect was that the adopted party became *surus heres* to the adoptor, and if he died intestate with no natural children to share with the adopted child the latter succeeded to the whole of his estate. It has been seen that in arrogation the consent of the arrogated party was necessary; strictly speaking, therefore, an *impubes* or *pupillus* could not be arrogated, but this was allowed by imperial rescript, provided it was done with the consent of the infant's relatives, or the authority of his tutor. The arrogator was obliged to give security that if the infant died under the age of puberty he would return all his property to his relatives; that he would not emancipate him without just cause; and if he did so that he would restore all his effects, and leave him a fourth part of his own property in his will². Justinian made further regulations on this subject³. If a father arrogated his natural son he was thereby reduced *in patriam potestatem*; and this was probably the mode of legitimation before the time of Constantine.

¹ D. I. 7. 6.

² I. I. 11. 3. and D. I. 7. 17. 1. 2.

³ C. VIII. 48. 10.

CHAPTER IX.

Of Guardianship.

BOOK
I.

Tutela.

THIS chapter treats of guardians and of the law relating to them. The natural guardians of children are their parents; but as they may die before the children are able to take care of themselves, the Civil law of every country determines who shall, in such case, discharge the office of guardian, and also regulates and enforces the duties of it.

The guardianship of the Roman law was divided into two parts:—1. *Tutela.* 2. *Cura.*

Definition.

1. *Tutela* is defined as *vis ac potestas in capite libero, ad tuendum eum, qui propter ætatem se defendere nequit, jure civili data ac permissa*¹. The office lasted till the pupil arrived at *pubertas minus plena*,—fourteen or twelve years of age.

2. *Cura* is defined as *potestas administrandi bona et rem familiarem eorum, qui rebus suis ipsi superesse nequeunt*². This terminated when the minor arrived at the age of 25 years.

Three kinds of Tutela.

The *Tutela* was of three kinds. 1. *Testamentaria.* 2. *Legitima.* 3. *Dativa.* We will consider each in order.

Testamentaria.

1. *Testamentaria tutela.* The Twelve Tables contained this provision: *Paterfamilias uti legassit super familia, pecunia tutelave suæ rei ita jussit*³. Children being *res Mancipi* in the power of the father were obviously included in the term *tutela suæ rei*, and therefore it gave power to a *paterfamilias* to name and appoint a guardian for his children by his last will and testament. The will of the *paterfamilias* was the title of the testamen-

¹ I. I. 13. 8.

² Hein. *El.* 266.

³ Ulp. *Frag.* IX. 14.

tary guardian; and the testator, be he grandfather or father, could appoint a guardian for all children, born or posthumous, who at his death would be *sui juris*, and under the age of puberty. This office could only vest in *Capite libero*, though a slave might be appointed, who thereby became free. The appointment might be simple, or with some condition annexed, provided it were lawful or possible: it might also be from a certain time to a certain time¹.

CHAP.

~~XXV.~~Positive or
condi-
tional.

This guardianship, as a matter of course, excluded those who by law would otherwise have been entitled to the office, so long as it had an existence *tam re quam spe*, i. e. whether it were positive or depending on some condition². The simple appointment of this guardian in the will of the paterfamilias was sufficient: if, however, he were a person whom the law did not recognize, or if he were appointed in a codicil merely, then it was essential that such appointment should be confirmed by the Prætor³. If the will were bad, or became ruptus, irritus, destitutus, or recissus⁴; or if the children were all of the age of puberty at the death of the testator, there was an end of the appointment.

If the paterfamilias died intestate, or if he omitted to name a guardian in his will for his infant children, the office then vested by operation of law in the legal guardian. Of this tutela there were four kinds: 1. Agnatorum. 2. Patronorum. 3. Quasi-patronorum. 4. Fiduciaria.

Legitima
tutela.

1. The legal guardian by the Law of Rome was he who would have succeeded to the estate had the infant or infants not existed: the rule was, *ubi successionis est emolumentum, ibi onus esse debet*⁵. This was derived from the law of the Twelve Tables, which Heineccius⁶ considers the Decemviri

¹ D. XXVI. 2. 8. 2.² D. XXVI. 2. 11.³ D. XXVI. 3. 1. 1.⁴ See post. book II. ch. 6.⁵ I. 1. 17. pr.⁶ Hein. Ant. I. 13. 5.

BOOK
I.

The nearer
excluded
the more
remote.

adopted from the laws of Sparta. It was a rule which naturally involved great danger to the infant. Solon excluded the *agnati* for this reason, confiding the person of the infant to the *cognatus*, who never could inherit; and the care of his estates to the *agnatus*, the next successor, provided he were worthy of the trust. Lord Coke, advert-
ing to the legal guardian of the Romans, says, it is *quasi agnum committere lupo ad devorandum*¹. The nearer *agnatus* excluded the more remote, and where they stood in the same degree they were all entitled alike². All these were liable to be set aside, not only by the *capitis diminutio*, but also whenever their incapacity, or want of integrity, was proved before the Prætor.

Justinian abolished all distinction between the *agnati* and *cognati*, and admitted the latter to the legal guardianship³.

Tutela Pa-
tronorum.

2. Patronorum. If the *Libertus* died intestate, his patron, or the heir of his patron, succeeded to his property; therefore if he left infant children he became their legal guardian.

Tutela
quasi-pa-
tronorum.

3. Quasi-patronorum. When the father emancipated his son he reserved to himself the rights of heir-at-law by the *pactum fiduciæ*⁴, and he thereby became *quasi* patronus, and the son *quasi* *libertus*, consequently he became legal guardian to his infant grandchildren, if any existed.

Tutela Fi-
duciana.

4. Fiduciaria tutela. When a father emancipated an infant child he remained its legal guardian; if, therefore, he should die before the child had reached the age of puberty, the guardianship devolved upon his heir, if he were *plenæ ætatis*, 25 years old⁵. In default of this it went to a brother of the deceased. This was therefore the guardianship of an elder brother to an emancipated younger brother, or of an uncle to an emancipated nephew.

¹ 1 Inst. LXXXVIII.

² D. XXVI. 4. 8.

³ Nov. CXVIII. ch. 4. 5.

⁴ See ante, ch. 5.

⁵ D. XXVI. 4. 4.

If the testamentary and legal guardians should both fail from non-existence, incapacity, or unfitness, this deficiency was supplied by the dative guardian, so called because *datus a Prætorē*. This was an *actus legitimus*, a legal process, *quo deficientibus testamentariis et legitimis, tutores a magistratu ex lege dantur*. These guardians were first established in Rome A.U.C. 557 by the *Lex Atilia*, which gave the Urban Prætor, in conjunction with the Tribunes of the people, the power of assigning guardians to those infants who had neither testamentary nor legal guardians. In the year U.C. 733 this Law was extended to the provinces by the *Lex Julia Titia*, which gave the Proconsul, or Præses, the like power; and in all cases security was exacted for the due performance of the duties of the office. If the property of the infant were under 500 solidi, guardians might be appointed by the minor magistrates¹. If the testamentary or legal guardian laboured under any disability, or was unable to assume his duties, being absent, or a prisoner of war, or was removed from his office, or excused, his place must, in all such cases, be supplied by a dative guardian². The appointment of a dative guardian must be positive; no condition could be annexed.

We must next inquire into the duty and authority of guardians. The duty of the guardian is set forth in the words included in the definition of his office; *ad tuendum eum*; and this principally consisted in,

1. Taking care of the person of the infant.
2. Administering his affairs.
3. Giving authority to his acts.

1. The tutor is bound to protect the person of the pupil, and to promote his education according to his rank in life³. He must supply a proper maintenance for his pupil according to the circum-

OHAP.
IX.

Tutela
dativa.
do call. by modern
commentators. giving
uses it in sense of
testamentary tutor.

Lex Atilia
and Julia
Titia.

tutores Atiliani
u. Julii Titiani

not do require
the tutela was
for action & when it
was appointed it
was given to the
magistrate

Duties of
the Guardian.

¹ C. I. 4. 30.

² D. XXVI. 4. 1. 2. and D. XXVI. 2. 11. 1. 2.

³ D. XXVI. 7. 12. 3.

BOOK
I.

stances of his estate', but he is not obliged to tax his own substance for the support of the pupil where it is clear he cannot be repaid².

2. He must administer the property of the pupil like a careful Paterfamilias, taking all due means to preserve and improve it, but must beware how he enters into any rash suits, or he will have to bear the expense³. If property be lost by his negligence he must make it good. He must pay all debts due from the pupil; and if he have any legal claim on the estate he may pay himself⁴. If any transaction should take place between the tutor and the pupil respecting the property of the latter, whereby the tutor, or those connected with him will be benefitted, it must be done by the consent of a co-tutor⁵. Whenever an action arose between the pupil and the tutor, or *vice versa*, a curator *ad litem* was appointed⁶.

3. An impubes within the age of infancy, seven years, could do no act whatever, but above that age he could do all acts with the authority of his tutor. He might however enter into any contract whereby he improved his circumstances without his tutor's sanction, i.e. if such transaction were for the benefit of the pupil it might be enforced⁷. The tutor must be present, or his authority was of no avail.

*Duties of
the Pupil.*

The duties of the pupil, on the other hand, were to obey his tutor in all things within the scope of his authority; and to reimburse him all necessary outlay and proper expenditure during the tenure of his office.

*Tutela how
terminated.*

The Tutela was ended by the death of tutor or pupil; by the pupil reaching the age of puberty; also if the pupil were arrogated, or if the tutor suffered the *maxima* or *media capitis diminutio*,

¹ D. XXVIII. 2. 2. 3. ² D. XXVIII. 2. 3. 6. ³ C. v. 37. 6.

⁴ D. XXVI. 7. 9. 4.

⁵ D. XXVI. 8. 5. 2.

⁶ D. XXVI. 1. 3. 2. and c. v. 44. See also Ulp. *Frag.* XI. 4.

⁷ I. 1. 12. *pr.* and D. XXVI. 8. 5. 1.

for the *vis ac potestas* would no longer be vested in *capite libero*, and therefore the office would be at an end. If the testamentary tutor were appointed conditionally, the existence or duration of the office must depend upon the condition, whether the tutor were discharged upon his own petition, or upon complaint against him for dishonest conduct.

CHAP.
IX.

The tutorship being over the office of the curator began. The curator had no direct control over the person of the minor. His duty is represented as *potestas administrandi bona, et rem familiarem eorum, qui rebus suis ipsi superesse nequeunt*¹. No contract could therefore be entered into by the minor with reference to his estate without the consent of his curator. But by the law of Rome the Furiosus and the Prodigus² were also under the control of a curator, whence a decided repugnance was manifested by minors to be placed in the position of madmen and spendthrifts. By the *Lex Lætoria*, the date of which is uncertain, it was decreed that curators should be appointed for all minors who made application, and that all contracts entered into by them, and actions against them, should be void³. The Emperor Marcus Antoninus afterwards decreed that all minors should be put under the control of curators without detriment to their characters⁴. Subsequently Ulpian informs us⁵ that the Prætor granted the *restitutio in integrum* to all minors whose estates had been damaged. The edict runs thus, *Quod cum minore quam viginti quinque annorum gestum esse dicetur, uti quæque res erit, animadvertam*. Ulpian also informs us⁶ that when he wrote, A.D. 222, all minors were under the control of curators. But how does this agree with the maxim, *Inviti adolescentes curatores non recipiunt*⁷? It would appear that the good sense of minors, from the disadvantages and risks

Curatela.

Lex Lætoria. was passed in the time of Augustus.

¹ C. v. 4. 8.

² D. xxvii. 10. 1.

³ Hein. Ant. i. 23. 6.

⁴ Id. i. 23. 8.

⁵ D. iv. 4. 6.

⁶ D. iv. 4. 1. 3.

⁷ I. i. 22. 2.

BOOK
L

they would be exposed to, induced them to concur in the appointment of their curators when the office of tutor expired¹.

*Curatela
legitima
and da-
tiva.*

Strictly speaking there could be no *testamentaria curatio*, because the Twelve Tables confined the paterfamilias to the *tutela*, but it was either *legitima* or *dativa*. The *legitima curatio* was that of madmen and prodigals, who were delivered by the Prætors *interdictum* into the control of their *agnati*; all others would be *dative*, being appointed, or at least their nomination being confirmed, by the Prætor, or any of those magistrates who had the like authority in the case of tutors.

How ended.

Venia ætatis.

The *curatio* was ended: 1. By the minor becoming of age, twenty-five years. 2. By the *venia ætatis*, i.e. where the minor on account of superior discretion obtained permission to manage his own affairs; males at twenty, and females at eighteen years of age², granted by Constantine. 3. By death, natural or civil. 4. When the curator was removed upon complaint against him, or was permitted to resign his office. 5. In the case of insane persons when they recovered from their malady.

An action lay against the curator in the same case as against the tutor. A curator could not name a curator in his place; but on account of illness or unavoidable necessity, he might appoint a deputy, for whom he was answerable, and who was called *Actor*.

Actor.

Tutors and curators before entering upon their duties were obliged to give security for the property of the infants and minors, which by virtue of their offices came into their hands. This was called *Satisfactio*³, and was *cautio præstita datis fidejussoribus*⁴, a security rendered by means of sureties. A testamentary tutor was exempted from the necessity of giving security⁵; and so also

*Satisfactio,
cautio fide-
jussoria.*

¹ D. XXVI. 7. 33. 1.

² D. II. 8. 1.

³ C. II. 45. 2.

⁴ Hein. *El.* 279.

⁵ C. V. 42. 4.

was he who was appointed by the Prætor *cum inquisitione*, after due investigation as to his character and solvency. All legal guardians were obliged to give security, excepting the Patroni. If perchance there were several testamentary guardians who could not all act, he was preferred who gave the best security; and in this way the selection was usually made when several contended for the office.

CHAP.
IX.

The guardian bound himself in a certain sum which was sufficient to cover the estate of the infant or minor; and he produced *fidejussores*, ^{*Fidejussores.*} sureties, each of whom were bound in a like sum as a collateral security. This was done by stipulation, which was a verbal contract¹. If the guardian were a defaulter the *fidejussores* became liable in his stead.

If insufficient security were taken through the negligence of the magistrate, he became liable for the deficiency by the *actio subsidiaria*; but this appears to have applied only to the minor ^{*Actio subsidiaria.*} magistrates².

Since the office of guardian was considered as a *munus publicum*³, parties might for certain reasons claim to be exempted. These exemptions were ^{*Excuses.*} classed under three heads:

1. Ob privilegium. 2. Ob impotentiam. 3. Existimationis periculum.

1. Persons who might claim exemption Ob ^{*1. Ob privilegium.*} privilegium might nevertheless voluntarily discharge the duties of tutor or curator. If they intended to avail themselves of their privilege they must do so before they entered upon the duties of the office; or, having promised to act, the plea of privilege was unavailing⁴. They must plead their excuse within fifty days⁵. The grounds of voluntary exemption were numerous. First, the *jus trium liberorum* by the Lex Papia Poppæa; having three

¹ See *post.* book III. ch. 6.

² D. XXVII. 8. 1.

³ I. XXV. 1.

⁴ D. XXVII. 1. 15. 1.

⁵ I. I. 25. 16.

BOOK
I.

children born at Rome, or four in Italy, or five in the provinces. Secondly, all magistrates, grammarians, rhetoricians and physicians might decline. Thirdly, the tutor at the close of his office might refuse to become curator to the minor¹.

2. Ob impotentiam.

2. Ob impotentiam. This involved an inability to discharge the duties of the office, such as being absent on the service of the state, being already occupied with three tutorships or curatorships. Poverty, illness, madness, blindness, and advanced age, were also grounds of exemption.

3. Existimationis periculum.

3. Ob existimationis periculum. Where there had been a serious enmity existing between the father of the infant and the person named as tutor in his will, and no reconciliation had taken place, this was considered as a sufficient cause of excuse, because such an appointment was intended as an annoyance², by subjecting him to the trouble and risks of the guardianship³.

Postulatio suspecti.

If any grave suspicion should arise that the tutor or curator was either abusing or neglecting his trust, he became liable to the *crimen suspecti*, which is as old as the Twelve Tables⁴, and which is defined to be *accusatio quasi publica tutoris vel curatoris, non ex fide gerentis, ad remotionem ejus et aliquando pœnam arbitriam infligendam comparata*⁵. Any tutor or curator was liable to the *crimen suspecti*, whose conduct was such as to lead to the obvious presumption of his being guilty of fraud or negligence⁶. A pupillus could not accuse his tutor, but an adult, under the direction of his friends, could accuse his curator⁷; and since the *accusatio* was *quasi publica* any one interested in the welfare of the pupil might exercise it, not excepting women. Justinian conferred the guar-

¹ C. v. 62. 20.² D. xxvii. 1. 6. 17.³ I. i. 25. 9. 11.⁴ D. xxvi. 10. 1. 2. The reader is referred to Dr Colquhoun's work, where the various grounds of excuse are treated of more at large.⁵ Hein. El. 302.⁶ D. xxvi. 10. 8.⁷ D. xxvi. 10. 7.

dianship on the mother and grandmother in preference to the *agnati*¹.

CHAP.
IX.

This action against a guardian was called the *Postulatio suspecti*, because the party accusing *postulabat*, i.e. *petebat actionem* before the Prætor². If the Prætor thought sufficient cause was shewn *dabat actionem*, and the accused party was immediately suspended from his functions *pendente lite*. If convicted of *dolus*, positive fraud, he was removed *cum infamia*, but if only gross negligence were proved against him he avoided the stigma of infamy³. The power of removal was lodged with the Prætor in Rome, and with the Præses or Proconsul in the provinces. If the accused party were convicted before the Prætor of *facta atrociora*, the Prætor having no criminal jurisdiction, he was sent to the Præfectus Urbis to be punished⁴. This action would only lie during the continuance of the office, its objects being the removal of a dishonest or negligent guardian. In case of the death of the guardian, or the expiration of the guardianship, the remedy was the *actio tutelæ*, which lay against the guardian and his *fidejussores*; and in case of his death against his *heredes*, i.e. his executors.

The *Tutela muliebris* has naturally a place in this chapter, though it is widely different from the *tutela minorum*. The ordinary tutelage of females having expired by their arrival at the age of 25 years, the *tutela muliebris* began. Women unmarried, and not in *patria potestate*, were in *perpetua tutela*. The tutor in this case answered to what in the law of England would be called the trustee. The Romans probably copied it from the Athenian law, where the woman could not sue or be sued without her *Kύριος* being made a co-plaintiff or co-defendant⁵. So also in Rome, if the woman was about to marry, or to enter into

Tutela muliebris.

¹ C. v. 35. 2. Nov. cxxviii. c. 5.

² Hein. Ant. iv. 6. 19.

³ I. xxvi. 6.

⁴ D. xxvi. 6. 1. 8.

⁵ Hein. Ant. i. 13. 16.

BOOK
I.

any transaction with respect to her property, such as a purchase, a sale or a mortgage, the whole would be void unless done with the concurrent authority of her tutor. The husband of a married woman was her tutor if she were *in manu mariti*, but if only *in matrimonio*¹ a tutor must be appointed, unless she were in the power of her father. The will of the husband frequently contained a clause appointing a tutor for the wife on his decease, or permitting her to choose one, thus *Uxori meæ Titius tutor esto*, or *Titiae uxori meæ tutoris optionem do*². This guardianship was considered necessary on account of the *infirmetas consilii* of the woman, or, as Gaius terms it, *animi levitas*³, whereby she was liable to be overreached in serious matters of business. Hence the importance of trustees at the present day where the property of females is concerned.

¹ See *ante*, ch. 6.² Gai. I. 149, 150.³ Gai. I. 144.

CHAPTER X.

Of Corporations.

BESIDES the former division of persons considered in their natural and civil capacities, there are also artificial persons, called in the Civil law *Universitates* and *Collegia*. CHAP.
X.

Roman corporations are considered to have had their origin as early as the time of Numa. If the authority of Plutarch be doubted, it is certain that they existed in all their vigour during the Republic, and the law relating to them must have been copious; yet we have only two meagre titles in the *Digest*, and nothing in the *Code*, for our information. *Origin.*

A corporation is a fictitious legal person recognized by the State as the subject of civil rights and privileges. This legal person among the Romans consisted of a body of individuals united for some permanent object, and invested with the power of acting as a single person; but this legal person must be considered as entirely apart from the physical persons who constitute the corporation. They were called *Universitates*¹, *Corpora*², and *Collegia*³. *Definition.*

Universitates, corpora, collegia.

Corporations were constituted by public authority. This was done by a law, or a *Senatus-consultum*, or by an Imperial constitution⁴.

Three persons at least were required to constitute a Corporation, though it could subsist if the community were afterwards reduced to one: "Tres *How constituted.*

¹ D. III. 4. 1. 3.

² D. III. 4. 1.

³ D. III. 4. 1. 1.

⁴ *Ib.*

BOOK
I.

*Character-
istics,
powers and
privileges.*

*Obligations
and liabi-
lities.*

*How dis-
solved.*

faciunt collegium, ait Neratius Priscus, et hoc magis sequendum est¹." But if reduced to one member, the rights, privileges, and liabilities, would still vest in him: "Si Universitas ad unum redit, magis admittitur posse eum convenire et conveniri, quum jus omnium in unum recideret, et stet nomen Universitatis²." One of the chief characteristics of corporations, and at the same time the main object of their establishment, is their perpetuity, whereby they are not liable to the instability and fluctuation incident to private partnerships. Hence their peculiar fitness for the promotion of religion, learning and commerce. Corporations, when once duly constituted, are invested with all powers necessary to effectuate the objects for which they were created. They can make their own Statutes, or bye-laws, provided they be not contrary to the laws of the State, which provision appears to be as old as the Twelve Tables³. They have a common chest, and can sue or be sued, and do all other corporate acts by their *actor* or *syndicus*⁴. Two thirds of the members were necessary to make their acts valid⁵; for though the authorities here referred to concerned the Decuriones in particular, there is no reason to suppose that other corporations were not guided by the same law. The obligations or liabilities of a Corporation affected it in its corporate capacity only, for "si quid universitati debetur singulis non debetur; nec quod debet universitas singuli debent⁶." A Corporation as such cannot commit crimes or offences. It ceases to exist when the last member dies, or when it is dissolved by the State. In such a case the remaining property belonging to the corporation, if it were one designed for public purposes, becomes the property of the state; but if

¹ D. L. 16. 85.

² D. XLVII. 22. 4.

³ C. X. 31. 45; D. L. 9. 3.

⁴ D. III. 4. 7. 1.

⁵ D. III. 4. 1. 1.

⁶ D. III. 4. 7. 1.

the corporation were designed for private purposes, when it is dissolved by the State, its property is divided among the last remaining members. In the case of a corporation constituted for private purposes, when it is extinguished by the death of the last member, the remaining property would vest in his heirs.

CHAP.
X.

ROMAN CIVIL LAW.

BOOK II.

OF THE RIGHTS OF THINGS.

1

2

3

4

5

6

7

CHAPTER I.

Of Property in General.

THE second book of the Civil law, according to the arrangement of the *Institutes* of Gaius and Justinian, treats of the rights of property, that is to say, the rights springing from those things which we have lawfully appropriated to ourselves; and which consist in the free use, enjoyment and disposal of such things without any interference or control. The origin of this right we will more fully consider in the next Chapter, the present object being to explain those things which can, or cannot, be the subjects of property, or in *dominio privato*. CHAP.
I.
Rights of property.

The subjects of property are called *Res*, which are thus defined, *Quæ ejus sunt naturæ ut in bonis esse possint*¹. And here we have a distinction between *res* and *bona*. *Res* are such things as may become our property, and, according to the definition, may not yet have been appropriated by any one. After occupation and appropriation they then become *bona*, and are *in patrimonio*; by which term is meant that right of property in things which are lawfully possessed, and of which the possessor was deemed to be *dominus*, so that he could dispose of it by sale, or by testament; and which, according to the Civil law, would descend to his heirs in case he died intestate.

The Roman jurists divided *res* into, first, *corporales*; *quæ tangi possunt*. Secondly, *incorporales*; *quæ tangi non possunt*². The latter of these and *Corporales and incorporeales.*

¹ Hein. *El.* 312.

² Gai. II. 13. 14.

BOOK
II.

the law relating to them constitute the subject of the third Chapter.

In considering the law of private property, since those things only can be subject to it which are *in patrimonio*, things early became divided into two classes: first, *res extra patrimonium*, things incapable of possession, or incapable of being exclusively possessed by private individuals. Secondly, *res in patrimonio*, the property of private individuals, said to be *in dominio privato*.

The following analysis will explain the division:

Res	{	1. Extra patrimonium . . .	{	1. Communes.	
				2. Publicæ.	
				3. Nullius.	
				4. Universitatis.	
				5. Divini juris	{ 1. Sacræ.
					2. Religiosæ.
					3. Sanctæ.
		2. In patrimonio	{	1. Corporales	{ 1. Mobiles.
					2. Immobiles.
				2. Incorporales	{ Servitutes.
					See Chap. III.

Res Communes.

Publicæ.

Nullius.

Universitatis.

Divini juris.

Res communes are such things as are common to all mankind, e.g. the air, running water, the sea, and its shores. *Res publicæ* are rivers and their banks¹, seaports and highways, which are common to some particular nation. *Res nullius* are the property of no one, either because they have not yet been occupied, or because they are incapable of being occupied by any private individual. *Res universitatis*, the property of a corporation. *Res divini juris*, which are classed under three heads: 1. *Sacræ*, temples dedicated to the worship of the Gods. 2. *Religiosæ*, sepulchres and tombs, where a dead body was interred. 3. *Sanctæ*. It is difficult to draw the distinction between these and *sacræ*, though there was a wide difference; city-walls and ambassadors are examples. The colours

¹ I. II. 1. 5.

of a regiment would perhaps in the present day be an example. CHAP.
I.

The above-mentioned things cannot be the subject of property, because they are said to be *extra commercium humanum*. Having therefore ascertained of what they consist, our attention must be confined to *res in patrimonio*, which are classed under two heads; *corporales* or *incorporales*. *Extra Com-
mercium.*

Before however taking leave of *res extra patrimonium* it is necessary to explain the double sense in which the Roman jurists considered *res nullius*. First, *Res nullius actu et potentia simul*. These are such things as neither are, nor can be, the property of any private person, because they have been appropriated to the use of the state, or of a corporation, or have been set apart for religious purposes. Secondly, *Res nullius actu solo licet non potentia*. These comprise all things unappropriated, but which are capable of being appropriated, such as waste lands, unoccupied islands, &c., the maxim being *Res nullius occupanti cedunt*. *Res nul-
lius.*
*Actu et
potentia.*
*Actu solo
licet non
potentia.*

Property, or *dominium*, in things may be either in possession, or in action. The former is called *Jus in re*; the latter *Jus ad rem*.

Jus in re is where the owner is in the entire and peaceable possession of his property. *Jus ad rem* is where the party was entitled to the property in question, but had not possession till some one gave him that possession on whom the obligation to do so rested. Five hundred aurei which I have in a bag would represent *Jus in re*; but five hundred aurei which Titius owes me on a stipulation is *Jus ad rem*, so long as the stipulation is unfulfilled. This will be more fully explained in the law of actions¹. *Jus in re
and Jus
ad rem.*

The owner is called *Dominus*, and his property *Dominium*, which is defined to be *Jus in re corporali, ex quo facultas de ea disponendi eamque* *Domi-
nium.*

¹ See post. book IV.

BOOK II. *vindicandi nascitur, nisi vel lex, vel conventio, vel testatoris voluntas obsistat*¹.

Dominium was either *plenum* or *minus plenum*. *Dominium plenum* represents owner and occupier in one person; *minus plenum* was where the owner let his house to an *inquilinus*, or his land to a *colonus*. Here a double *dominium* is created; the former is called *directum*, which represents the property of the landlord, his right of sale, or of action to recover possession; the latter *utile*, which was the right of the tenant to his beneficial occupation for the rent he paid, under the conditions, and for the period agreed upon.

Dominium Quiritarium.

Dominium Quiritarium. This was the entire and indefeasible right of a Roman citizen in his property, which rendered him free from all actions which would impeach his title; and none but Roman citizens could possess it. Ulpian gives the different modes whereby it could be acquired, viz. "Mancipatione, traditione, in jure cessione, usucapione, adjudicatione, lege²."

If property were transferred to a Roman citizen, however lawfully, but unaccompanied by one of the above-mentioned legal forms, the receiver had no legal title. His possession was called *Dominium Bonitarium*, he was a *bona fide* possessor, and the thing possessed was said to be *in bonis*, but if deprived of it he could bring no action for its recovery, because he could not prove a legal title, and so would be non-suited. A year, dating from his first possession of the property, having elapsed he would then become *Dominus quiritarius*, *usucapione*³. This distinction between *Dominium quiritarium* and *Bonitarium* was abolished by Justinian⁴.

This brings us to *res Mancipi*, and *nec Mancipi*, and the difference between them. In the transfer

¹ Hein. *El.* 335.

² See *post.* ch. 5.

³ Ulp. *Frag.* XIX. 2.

⁴ *C.* VII. 25.

of property mancipation was the usual mode by which it was effected; and it was done in the presence of five witnesses, Roman citizens, specially summoned for the purpose; the Libripens and the Antestatus. In the sale of a slave, for example, the seller said, *Mancupo tibi hunc hominem*, &c. The buyer replied, taking hold of the slave, *Hunc hominem meum esse aio*, &c.; he then paid down the price agreed upon, and the Antestatus called upon the five witnesses to bear testimony to the fact. This at once vested the legal title in the buyer. Without mancipation he would only have had bare possession.

Res Mancipi are thus defined, *quæ solenni ritu inter solos Romanos Cives ita vendi alienarique poterant, ut emptor eas mancuparet, et venditor earum evictionem præstaret*¹. If the purchaser of a thing were by legal means deprived of it, the seller was bound to make good the title, i.e. *evictionem præstare*; the maxim of the Roman law being *caveat Venditor*, contrary to the English law.

Res nec Mancipi *erant quæ solenni ritu vendi alienarique non poterant*². But what determined whether a thing were *mancipi* or *nec mancipi*? Amongst *res Mancipi* Heineccius begins with prædia in Italico solo, and mentions *res Mancipi* under seven heads, excepting elephants and camels³; Gaius excepts bears, lions, and all animals *feræ naturæ*⁴. With these exceptions, the reader must divest himself of the idea that a thing was *mancipi*, or *nec mancipi* from any peculiarity in itself. The locality, and not the thing, made the distinction. Every thing within the *Italicum solum* must be transferred by mancipation, because the *Jus Italicum* required it. Adeoque, says Heineccius, *et in provinciis, si quando locis erat datum jus Italicum*⁵. *Res nec Mancipi* therefore were every thing which was extra solum, et *Jus Italicum*.

¹ Hein. Ant. II. I. 17.² Id.³ Hein. Ant. II. I. 18.⁴ Gai. II. 16.⁵ Hein. Ant. II. I. 18.

CHAPTER II.

Of the natural modes of acquiring Property.

BOOK
II.

HAVING considered in the first chapter what are the subjects of property, we now proceed to examine how property is acquired.

Property.

And first, as to the original institution of property. In the beginning of the world every thing was *res nullius*; and the maxim being that *res nullius occupanti cedunt*, the taker acquired that title which no one else had. His time and labour being expended upon a piece of land in fencing and tillage his *right* was established. Before the laws of civil society existed he might be expelled by one stronger than himself, but this could not be done without the commission of a *wrong*. Property at first was often only temporary, lasting so long as the occupation continued. If the thing occupied were abandoned it became a derelict, and returned to its former state of *res nullius*, and the next occupier had a right to it¹.

*Modes of
acquiring.*

Property is acquired, 1. By the law of nations.
2. By the Civil law.

The natural modes of acquiring property are three: 1. Occupancy. 2. Accession. 3. Tradition.

1. *Occupatio.*

And first, as regards occupation.

*Occupatio est apprehensio rerum corporalium nullius cum animo sibi habendi*²; the taking possession of corporeal things which belong to no one with the intention of appropriating them to our own use.

¹ The reader is here referred to Blackstone, book II.—Of Property in general.

² Hein. *El.* CCCXLII.

BOOK
II.

wild animals¹. Dr Colquhoun calls animals *mansuefactæ naturæ*, "tame animals²." This would appear to lead to confusion. There are animals *feræ naturæ*, which may be so reclaimed as to have the *animus revertendi*, but the broad distinction between animals *mansuetæ* and *mansuefactæ* is this: the former have a regular *animus revertendi*, as domestic fowls or swine, the latter are in a state of control, which control being removed they would return to their wild habits³.

Occupatio
bellica.

Occupation by war extends both to the persons and property of enemies. If persons or moveable property be taken in lawful war, and be confined *intra præsidia*, or the camps and forts of the captors⁴; or if any portion of an enemy's territory were taken possession of by the Roman people, according to the law of war, it became the property of the state⁵.

Jus Post-
liminii.

Captives taken in war recovering their liberty were reinstated in their ancient rights by the fiction called *Jus Postliminii*. If a Roman citizen became a prisoner of war all his rights were suspended; but they were revived by the *Jus Postliminii*, which is defined by Paulus⁶ as the right of recovering what has been lost in war, and of being restored to our former *status*. This was accomplished by the return of the party to his country, or by escaping to the protection of some friendly ally of the state⁷. It involves the fiction that such an one had never been absent; *retro creditur in civitate fuisse*, says Ulpian⁸; and if he never returned his death dated from the day he was taken captive⁹. The *animus revertendi* is essential¹⁰, therefore, in the case of Regulus, who

¹ I. II. I. 14. Colq. DCCCCLXVII. 8. 9.

² Colq. DCCCCLXVII.

⁴ D. XLIX. 14. 5.

⁶ D. XLIX. 15. 19.

⁸ D. XLIX. 15. 16.

³ D. XII. 1. 5. 6.

⁵ D. XLIX. 15. 20. 1.

⁷ D. XLIX. 15. 19. 3.

⁹ D. XLIX. 15. 18.

¹⁰ D. XLIX. 15. 5. 3.

was sworn to return to Carthage, the *jus postliminii* was inoperative. CHAP.
II.

Territory came also under this law, for if an enemy have taken possession of land, and afterwards abandon it, or be driven from it, it reverts to its former state.

Occupancy in things found, relate, 1. To such *Inventio*. things as never had an owner, as a nugget of gold found on the surface of the earth or in the sea. 2. To things which cease to have an owner; as treasure and derelicts. Things found become the property of the finder; but they must be *res nullius*, or *res derelictæ*, i. e. having once had an owner they have been intentionally abandoned. An ex- *Res derelictæ*. ample of a derelict is not easily found in civilized society, because all property is too valuable, but among a semi-barbarous people like the Newzealanders, where a man removes his hut and leaves his plot of cultivated ground with no intention to resume the occupation, this is a derelict, and becomes the property of the finder should he choose to occupy it. Things found which have been lost *Things lost*. by accident must be restored to the owner, but if the owner were unknown, and could not be discovered, they would vest in the finder *usucapione* as the *bona fide* possessor.

*Thesaurus est vetus depositio pecuniæ cujus non extat memoria*¹. This comes under the head of *inventio*, and corresponds with the treasure trove of the English law. It is treasure of any kind hidden in the earth, or other secret place, for so long a time that the owner cannot be discovered. This is *no* derelict, because the concealment shows no intention to abandon. If it were found on another man's land the finder had half *jure inventionis*, the owner of the land half *jure accessionis*. If found on public land, half went to the finder and half to the public body to which the land belonged. If found by any one on his own land, or in a *locus*

¹ D. XLII. 1. 31. 1.

BOOK
II.Things
abandoned
by neces-
sity.Lex Rhodia
de jactu.2. Accessio.
Definition.Natural
accessions.

religiosus, which had no owner, the whole went to the finder. The finding must be by chance¹; for if the person finding be employed to search for it, or searched of his own accord, having reason to believe the treasure was there, he was entitled to no portion of it. Things lost by negligence or chance, or being abandoned upon necessity, are not derelicts. Things accidentally dropped from a carriage in a journey, or thrown overboard in a storm for the purpose of lightening the ship, are not derelicts, because there is no intention to abandon them, and therefore he who appropriates them to his own use is guilty of theft².

This law of the Rhodians³, which was early adopted by the Romans, decided that goods thrown overboard by necessity for lightening the ship were not to be considered as derelicts, and therefore did not become the property of the finder. It is the basis of our modern law of salvage; for if several parties hiring the ship for the transport of their property, and the goods of one, or more, were necessarily thrown overboard in the voyage to preserve the ship and the lives on board, it provided that the loss should be borne rateably by all according to the value of their property, in which also the ship was included.

The second mode of acquiring property by the law of nations is that of accession, which is defined as *jus acquirendi quod rei nostræ adjungitur incrementum*⁴, the right to that increase which becomes attached to our property. The maxim is *Accessorium sequitur suum principale*⁵. The proprietor of the principal thing becomes *ipso jure* entitled to the accessions or additions which may become attached to it.

These accessions were divided by the Roman lawyers into, 1. Natural. 2. Industrial.

Natural accessions were of five kinds.

¹ C. x. 15.² I. II. 1. 48.³ D. XIV. 2. 1.⁴ Hein. *El.* COCLIV.⁵ Broom's *Maxims*, 368.

1. *Fœtura animalium*. The young of slaves and cattle belonged to the master. CHAP.
II.

2. *Insula nova*. Islands formed in rivers abutting on the estates of private individuals belong to the owners of the land on the banks of the river. *Fœtura animalium.*
If different owners occupy the opposite banks, a line is drawn down the centre of the stream; then if the island rises in the centre the respective owners of the adjacent estates claim all that is on the right and left of the line, according to their frontages. *Insula nova.*
If the new land be all on the one side, or the other, of the middle line, it all belongs to the estate on that side. The owners on the opposite banks are the proprietors of the land under the water to the extent of their frontage, and therefore it remains theirs when it rises above the surface. Islands rising in the sea belong to the first occupier.

3. *Alluvio*. Whatever is added to land by the alluvial deposits of floods belongs to the owner¹. *Alluvio.*

4. *Vis fluminis*. Gaius interprets this as where the force of the current has detached a part of your estate, and caused it to attach to mine, it does not immediately become mine; but after the trees upon it have struck their roots into my soil it becomes a part of my estate². *Vis Fluminis.*

5. *Alvei mutatio*. Where a river changes its channel, the old channel becomes an accession to the estate adjoining; or if it ran between two estates each shared according to its frontage meeting in the centre. *Alvei mutatio.*

Industrial accessions were, Specificatio, Com-mixtio, Confusio, Adjunctio, Ædificatio, Plantatio et satio, Scriptura, Pictura. *Industrial accessions.*

1. *Specificatio est modus acquirendi, quo quis ex aliena materia suo nomine novam speciem faciens, ejus speciei dominium consequitur*³. A method of acquiring property whereby he who has made a new species from another man's materials thereby *Specificatio.*

¹ D. XII. 1. 7. 1.

² D. XII. 1. 7. 2.

³ Hein. *El.* CCCXLVIII.

BOOK
II.

becomes the owner of the things so made. In this and other cases which are now to be explained the question immediately arises, what right has any one so to use the property of another? The reader must understand that it is presumed he did so *bona fide*, under a mistake, and without any intention to defraud; but he is bound to pay the owner the value of the original material so used by him. In the case of *specificatio* there could be no *vindicatio*, no action, to recover back the *original* material, because it had ceased to exist, but the owner might resort to a *condictio*, an action for damages, to recover the value¹. If the *nova species* chanced to be such that the materials of which it was composed could be reduced to their original state, then the original material was to be returned². It would be impossible to reduce wine back to grapes, or oil to olives. The value of the grapes and olives must therefore be paid to the owner, and the wine and oil became the property of the maker.

2. *Commixtio*. This was where the *nova species* was produced partly with the property of the maker, and partly with that of another, as where a plaster was made of the drugs of the maker and another, or a vest from the wool of the weaver and another; in these cases the *nova species* belonged to the maker, who was bound to make compensation for the materials used. This applies likewise to *res aridæ*, as distinguished from *res liquidæ*, which latter came properly under the head of *confusio*. If the corn of two persons were mixed, if done by mutual consent, it would be joint property; if not, he who took the mixture must compensate the other, due regard being had to the quality of the corn so mixed. Whenever the *commixtio* occurred with reference to things which could be easily separated, as sheep or cattle, each resumed his own property³.

¹ I. II. 1. 25.² D. VI. 1. 5. 1.³ I. II. 1. 2. 8.

3. *Adjunctio*. This was where one had interwoven the purple of another into his cloth, and by purple is meant any thing of more value than the texture itself, as it could not be separated without destroying the web it became an industrial accession to the weaver; but if it were so attached as to be capable of separation in its original state it must be returned¹.

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II.

Adjunctio.

4. *Confusio*. This was the mixing of liquids, such as wines, or metals in a liquid state; if done by mutual consent of the owners, or by accident, the compound was common to the two².

Confusio.

5. *Edificatio*. This was where one built on his own land with another man's materials, or where he built on another man's land with his own materials. In the first case he might have returned the materials by pulling down the building, but a law of the Twelve Tables forbade this, and bound the builder to pay *in duplum* for the materials so used. In the latter, if he knew it to be the land of another he has forfeited his materials; and the building became an industrial accession of the owner of the land; if he were not aware that he was building on another's land then the owner of the land must pay the price of the materials and labour³.

Edificatio.

6. *Plantatio et satio*, planting and sowing. If one plant another's tree in his own land, or his own tree in another's land, the tree may in each case be claimed and recovered, unless it have struck root into the soil; in that case it then belongs to the owner of the soil; and if a tree be so planted that the roots strike into the land of two persons it is common to both⁴. In the case of sowing, if I, being a *bona fide* possessor, use my own seed upon another man's land, this is an industrial accession, but I must be paid for the seed and labour. If I know that I am sowing

*Plantatio
et satio*.

¹ I. II. 1. 26.

² I. II. 1. 27.

³ D. XII. 1. 7. 12.

⁴ D. XII. 1. 7. 13.

BOOK II. land that is not my own I forfeit my seed and labour. Again, if I use another man's seed on my own land, as the seed cannot be returned I must pay for it¹.

Scriptura. 7. *Scriptura*, writing on another man's paper, or vellum. In this case the writing follows the material. If Titius write a poem on my paper the poem belongs to me, but I must pay Titius the expense of the writing provided he were a *bona fide* possessor.

Pictura. 8. *Pictura*, painting on another's tablet. Here the painting follows the tablet, for which rule Gaius thinks no sufficient reason is given²; but according to Justinian it is because the value of the painting so far exceeds that of the tablet³. If therefore the painter be in possession of the picture he must pay the value of the tablet to the owner. If the owner of the tablet be in possession of the picture, he must pay the value of the painting if he meant to keep possession, otherwise an action would lie to recover the value. In all the above cases the transaction is supposed to be *bona fide*, otherwise the party is liable to the *actio furti*.

Bonæ fidei possessor. The *bona fide* purchaser of an estate was secured in his right to the crops, according to Paulus⁴, not only which he had sown, but of every description which the land produced, and they vested in him as soon as severed from the soil. *Bonæ fidei* possessor *fructus percipiendo suos facit*, and the reason given by Justinian⁵ is *pro cultura et cura*, but he further adds that the owner cannot call the possessor to account *de fructibus ab eo consumptis*. This has led to disputes among commentators as to the *fructus percepti*, and the *fructus consumpti*. It would appear that the owner of the land could claim the former, but he would doubtless have to pay all the expenses of culture.

¹ D. XLI. 1. 9.

² Gai. II. 78.

³ I. II. 1. 34.

⁴ D. XLI. 1. 48.

⁵ I. II. 1. 35.

Traditio is the third and last natural mode of acquiring property. It is classed among the natural modes, because it was the original, simple, natural conveyance of property from one to another, with the intention of the owner to part with his property, by the mere act of delivery. The increase of population would cause an increase in the value of property, and derelicts would cease to be common. Before a man abandoned his possessions, and allowed them to fall again into the common stock, he would seek to obtain something in exchange, for which he was willing to transfer his rights to another; and such an agreement being come to, the mere delivery transferred the rights of the first possessor to the receiver.

*Traditio est modus adquirendi derivativus, quo dominus qui jus et animum alienandi habet rem corporalem ex justa causa in accipientem transfert*¹. The meaning of the word *derivativus* is that the right of *traditio* is derived from the two original modes of acquiring property, viz. *occupatio* and *accessio*.

To make a tradition valid it was necessary,
 1. The thing delivered must be something corporeal, capable of delivery. 2. The delivery must be by the owner, having a right to alienate. 3. And an intention to alienate. 4. And no property vests in the receiver unless there be a good consideration for the transfer.

Traditio was, 1. *Vera*, 2. *Ficta*, 3. *Brevi manu*, 4. *Longa manu*, 5. *Symbolica*.

1. *Vera*, where a moveable thing was delivered by the owner to the receiver, or if immoveable, where the receiver was put in possession².

2. *Ficta*. Incorporeal property was incapable of absolute delivery. A delivery therefore was supposed by the expressed intention of the owner.

3. *Brevi manu*. This is where the property in question is already in the possession of the person

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II.

3. *Traditio*.

Necessary
requisites.

*Brevi
manu*.

¹ Hein. *El.* 000LXXX.

² *D.* XV. 1. 8. *Id.* XLI. 2. 3. 1.

BOOK II. to whom it is to be transferred, e.g. as a pawn, or a thing lent for use. In either case if the owner agree to make over the property to him which he only holds as a security, or for his accommodation, no further delivery need be made¹.

Longa manu. 4. *Longa manu* is where lands at a distance are pointed out by the owner, and so delivered by his verbal declaration².

Symbolica. 5. *Symbolica*. This is where the keys of a warehouse or a cellar are delivered to the purchaser whereby he can possess himself of the property which they contain³.

The above-mentioned acts need not necessarily be done by the owner of the property himself; for if done by his procurator, attorney, or recognized agent, the transfer will be equally valid.

¹ L. II. 1. 44.

² D. XLI. 2. 18. 2.

³ D. XLI. 1. 8. 6.

• occupatio { 1 *in situ*.
2 *occupatio bellica*.
3 *instructio* { 1 *instructio*
2 *thesaurus or hereditas*.

{ 1 *in situ*.
2 *in situ*.
3 *in situ*.
4 *in situ*.
5 *in situ*.
6 *in situ*.
7 *in situ*.
8 *in situ*.
9 *in situ*.
10 *in situ*.

CHAPTER III.

Of rights, or things incorporeal, and of real and personal Services.

THIS chapter treats of the second division of property, *res incorporales, quæ tangi non possunt*. These are rights which spring from real estates, and correspond with the chattel real of the English law. They are called "servitudes," services. A *servitus* is thus defined, *jus in re aliena constitutum, quo dominus in re sua aliquid pati, vel non facere tenetur, in alterius personæ reive utilitatem*¹. A right established in another's property, whereby the owner of that property is bound to permit something to be done in it, or to forbear to do something himself, for the convenience of some other person or thing. A *servitus*, therefore, consists either *in patiando* or *non faciendo*, the former being a positive, the latter a negative service. Services are divided into real and personal; and real are again divided into rural and urban. Before proceeding to explain these it is advisable to premise a few words as to their origin and importance.

CHAP.
III.

Servitus.
Definition.

Positive
and negative.
Real and
Personal.

The Roman *Servitus realis* corresponds with the easement of the English law. The property of any one must, as a general rule, of necessity be contiguous to that of some other proprietor; and the right which every owner has to the free use of his property very early led to the various servitudes. If the land of one were so situated that he could not get to or from the public highway without passing over the land of another; or if he could not drain his land without cutting

Origin of
real
services.

¹ Hein. *El.* CCCXCII.

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II.

a channel through that of his neighbour, he would in the first case be entitled to the *servitus* of *iter* and *via*, i. e. of a foot-path and road; and in the latter to that of *aquæductus*, drainage; and these rights might be established by tacit consent, or by mutual agreement. The estate which furnished the *servitus* was called the *prædium serviens*; that which claimed and enjoyed it, the *prædium dominans*; and this applied to all real services whether rural or urban. Personal services had their origin in contracts, legacies, or the judgment of a court.

Rural
services.

The services attached to rural estates were the following: *Iter*, a footpath, *Actus*, a driftway for driving cattle to and fro, *Via*, a road for going with carts and waggons, *Aquæductus*, the right of drainage through another's land. Among the rural services were also the following: *aquæ hauritus*, *pecoris ad aquam adpulsus*, *jus pascendi*, *calcis coquendæ*, *arenæ fodiendæ*, &c.¹ It will be seen therefore that *via* contained both *Iter* and *Actus*. *Iter* might be used for carrying a chair or litter, a horse also might pass². *Actus* included the passage of beasts and carts and waggons, provided they were empty; but you must not carry your spear up lest you knock the fruit off the trees. *Via* was the right of passing with loaded carts, and you might carry your spear upright³.

*Iter.**Actus.*

L. 1. 1. 1. 1.

*Via.*Urban
Services.

The urban services could only arise where the buildings of two persons were contiguous, but these services were not necessarily confined to towns. They were principally as follows: *Jus oneris ferendi*, the right of leaning your house against that of your neighbour; *Tigni immittendi*, of inserting a beam into your neighbour's wall, *propijciendi*, of overhanging his property; *Stillicidii vel fluminis recipiendi*, the right of having your eaves and gutters to drip and flow on to your neighbour's premises; *Altius tollendi*, vel non tollendi, the right of building your wall higher, or of

¹ D. VIII. 3. 1.² D. VIII. 3. 12.³ D. VIII. 3. 7.

preventing your neighbour from doing so; *Luminum, et ne luminibus officiatur*, the right of having windows, and of preventing your neighbour from intercepting the light; *Prospectus, et ne prospectui officiatur*, the right of prospect, and of preventing your neighbour from intercepting it by building or planting¹.

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III.

These urban services require some further explanation, because an act such as leaning my house against that of my neighbour, or of thrusting my beams into his wall, would *prima facie* be an unlawful act. How then did these rights arise? *Their origin.* The most natural solution of the question is this; both estates, the *serviens* and the *dominans*, were originally the same property; and on sale and divisions these services necessarily arose. If I build a row of contiguous houses, or an *insula domorum*, a block of houses, as it was called at Rome, on my own property, I am at liberty to do so as best suits my convenience. I think proper to lean No. 2 against No. 1, and to make the outer wall of No. 1 support the roof of No. 2, by inserting the beams into it. Suppose I afterwards sell No. 2, immediately the right *oneris ferendi*, which before had no existence, attaches to the purchaser; but he must be careful to include this in his agreement of purchase, which was done by a stipulation in this form, *Paries oneri ferundo uti nunc est, ita sit*²; and thus the *servitus* was created, and was transmissible to whomsoever became the owner of the house. So, again, suppose the windows of No. 2 looked into the garden of No. 1; unless the purchaser stipulated for the *Servitus luminum* his windows might be blocked up the next day. He would therefore bind the vendor against any obstruction thus: *Lumina uti nunc sunt, ita sint*³. And so of all other services which

¹ I. II. 3. 1. D. VII. 2. 2. 3. 4.

² D. VIII. 2. 33. Hein. Ant. II. 3. 3.

³ Hein. Ant. II. 3. 8.

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II.Rules re-
garding
services.

might be in any way necessary for the due convenience and enjoyment of the house.

The following rules respecting services must be observed. 1. Every service which is claimed must spring from the property of another, for *nulli res sua servit*¹. 2. No service can consist *in faciendo*, but *in patiando*, or *non faciendo*². 3. Every service must be entire in itself³; and lastly, 4. It must be founded upon a *perpetua causa*⁴, the ground of the claim must be of a continuous nature.

How cre-
ated.

The rural and urban services were created, 1. By stipulation or contract. 2. By will⁵. 3. By prescription, i. e. by uninterrupted enjoyment for the period required by law⁶. They were conveyed by a *quasi traditio*, the delivery of the estate which claimed the *servitus* operated as the delivery of the *servitus* also⁷.

How ex-
tinguished.

These rights were extinguished:

1. By consolidation, i. e. where the *res dominans* and the *res serviens* became the property of the same person.

2. Remissione⁸, by surrender of the right, or by allowing the owner of the *res serviens* to do that which obstructs the exercise of the right.

3. By ceasing to exercise the right; and

4. Lastly, by the destruction of the *res serviens*.

Personal
Services.

We must now consider the personal services, which were classed under three heads; *Ususfructus*, *Usus*, and *Habitatio*.

Usus
fructus.

1. *Ususfructus est jus alienis rebus utendi, fruendi salva rerum substantia*⁹. The right of using and enjoying the property of another without damage to the thing so enjoyed. Usufruct was in fact an estate for life, or for years, generally created by contract, or by will; more frequently perhaps by

¹ D. VIII. 2. 26.

² D. XLV. 1. 72.

³ D. VIII. 4. 16.

⁴ D. VIII. 1. 20. and D. VI. 2. 11. 1.

⁵ D. VII. 1. 1.

⁶ D. VIII. 1. 15. 1.

⁷ D. VIII. 2. 28.

⁸ C. VII. 33. 12..

⁹ D. VIII. 1. 14. 1.

last will and testament, where the testator wishing to provide for his widow, or some other relative, left his estate to his son *detracto usufructu*, and then gave the usufruct to the widow; who would thus have the entire use and enjoyment of the estate for life, unless a shorter period were named; and at her death the son would come into full possession. It is thus that a person who had the usufruct was said to enjoy *res alienæ*; because in this case, as the English law would express it, the fee was in the son. It might also arise by purchase, as where one had the right for life, or for years. Occasionally it might arise by the decision of a judge in *judiciis divisoriiis* where a family estate was divided among several claimants; perhaps it might be of such a nature that an equitable division could not be effected without giving to one of them an usufruct. It arose also by law, as where the father had a right to the son's *peculium paganum*.

How constituted.

The rights of the *Usufructuarius* extended to every thing that the estate produced¹; but this was confined to the *fructus ordinarii*; therefore he would not be entitled to *thesaurus* if found. He could let the estate, or even sell his life interest in it; but he could not change the *res fructuariæ*, even though it might be an improvement². Usufruct could not properly apply to *res fungibiles*, articles of consumption, *quæ numero, pondere, et mensura consistunt*, such as corn, wine, or even money; but it appears that a *senatus consultum* was passed in the reign of Tiberius³ allowing the *quasi* usufruct of consumable articles⁴, but a security was exacted from the *Usufructuarius* that he would return the like in quantity and quality. Usufruct was terminated: 1. By the death of the possessor, natural or civil. 2. By the consolidation

The rights of usufructuarius.

¹ D. VII. 1. 59.

² Hein. *ÆL* ccccxix.

³ D. VII. 1. 13 7.

⁴ D. VII. 5. 8.

BOOK
II.*Usus.*

of the two estates. 3. By the destruction of the *res fructuariæ*; and lastly, 4. By non usage.

2. *Usus est jus alienis rebus tantum ad necessitatem utendi, salva earum substantia*¹.

Here it will be observed that the person to whom *usus* is given is limited to the *jus utendi*; but has not the *jus fruendi*, which latter word, in its legal signification, meant the taking without stint of all that the subject matter produced.

*Rights of
Usuarius.*

The *Usuarius* could take as much of the produce of the garden or farm, as the case might be, as was necessary to supply the daily wants of himself and family, such as apples, olives, hay, straw, corn, and whatever the farm might produce; but he must not take these things *usque ad compendium*, to make a profit of them, as this would be *abusus*². It appears from the Digest that the rights of the *usuarius* would often vary according to the wording of the will, and the peculiarities of the things in which the *usus* was constituted; and the law was construed in a much narrower sense before the time of Ulpian³. If a *usus* were granted to one it was to be interpreted *pro dignitate ejus*. If the *usus* of cattle were given it was interpreted to mean only for draught, or for manuring the land, but in Ulpian's time the *usus* of the milk was allowed⁴.

He who had the *usus* of a house could occupy such parts of it as were necessary for his convenience together with his family and servants⁵. If the grant were to a single woman, and she afterwards married, her husband had a right to reside with her⁶. The *Usuarius* was strictly confined to the enjoyment of such things only as the *usus* specified; the extent of the user must be *tantum ad necessitatem*; and the *usuarius* could neither

¹ Hein. *El.* CCCCLXVI.

² *D.* VII. 8. 12. 1.

³ *D.* VII. 8. 2. 1.

⁴ *Id.*

⁵ *D.* VII. 8. 12. 2.

⁶ *D.* VII. 8. 4. 2.

sell, let, nor give away his right, which was terminated by death natural or civil, and also by omitting to exercise the right for ten years.

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III.

3. *Habitatio est jus alienas aedes inhabitandi* *Habitatio.*
*salva earum substantia*¹. This servitus contained more than *usus*, but less than *usus fructus*. It may be said to be a life estate in a house; the *habitaris* could sell or let his right, but it must be confined to the *jus inhabitandi*, and the house could not be used for other purposes than inhabitation². This terminated like the foregoing; but it appears it was not lost by the *capitis diminutio*; for which Modestinus seems to give a very unsatisfactory reason, because it consisted *in facto* and not *in jure*. It is difficult to conceive how the two could be separated. But see D. 50. 17. 24. *now no use.*

¹ Hein. *El.* cccxxix.

² C. III. 33. 13.

CHAPTER IV.

Of the Persons by whom Property might be acquired.

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II.

PROPERTY might be acquired not only immediately by a man's self, but also mediately by others whom he had under his power, as a son and a slave.

It has already been explained¹ that children under the power of the father, and slaves, were *res Mancipi*; and as such were incapable of the legal possession of property, consequently, whatever they might acquire belonged to their respective parents or masters. Yet both a son and a slave were allowed to have some little property of their own, which was called *peculium*. This was the consequence of the gradual relaxation of the *patria* and *dominica potestas*.

Peculium.

*Peculium est pusilla pecunia quam filius familias vel servus a rationibus paternis vel dominicis separatam habet*²: a very small sum of money which the *Filiusfamilias* or the slave was allowed to have to his separate use from his father's or master's accounts. This did not depend on the son, or slave himself, but must be expressly granted by the father or master³. It was thus divided:—

Peculium . . .	{	1. Militare . . .	{	1. Castrense.
				2. Quasi Castrense.
		2. Paganum . . .	{	1. Profectitium.
				2. Adventitium.

Militare.

The *militare peculium* was apparently at first only *castrense*, and it consisted of whatever a filius

¹ Book I. cc. 3 and 5.

² Hein. *El.* CCCLXXXIII.; D. XV. 1. 5. 3 and 4.

³ D. XV. 1. 4.

familias received from his father and relations, as necessary for his military outfit¹. This privilege having been conceded to the son who entered the army, it ultimately became impossible to deny the same to his brother who assumed the profession of the law, or of medicine. We find the Emperor Leo, A.D. 469², recognizing the *militia togata* to which the *peculium quasi castrense* was conceded; and Justinian decreed³ that this, consisting of whatever a filiusfamilias obtained as an advocate, or by the exercise of any other liberal profession, should enjoy the same privileges as the *castrense*.

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IV.

With respect to the *peculium castrense* and *quasi castrense*, the son possessed an entire right in it, and was so far considered as a *paterfamilias*; for he could dispose of it by gift *inter vivos*, and make a *mortis causa* donatio⁴. If he died intestate and without children his father was his heir⁵.

*Castrense
and quasi
castrense.*

Paganus signified whatever was not military; *Paganum*. and the *paganum peculium* was divided into *profectitium* and *adventitium*. The *profectitium* consisted of whatever the son received from his father; the legal estate as regarded this still remained in the father, but the son had the possession and the management. Yet if for any cause the father's property were confiscated the son's *peculium profectitium* was protected by a constitution of the Emperor Claudius⁶. The *peculium adventitium* consisted of whatever the son obtained from any other source than through his father, e.g. by his own industry, or as gifts from his relatives and friends: here the legal estate vested in the son, but the usufruct belonged to the father, who, in case of emancipation, was at liberty to retain half the usufruct for his life. Since the son, in this case could make no will, this *peculium* was subject to the law of intestate property. See Nov. 118.

Profectitium.

Adventitium.

¹ D. XLIX. 17. 11.

² C. II. 2. 7. 14.

³ C. III. 39. 37.

⁴ See post. ch. 5.

⁵ D. XLIX. 17. 14.

⁶ D. IV. 4. 3. 4. and Gothofred's note.

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II.Peculium
of the
slave.

In what has been said above respecting the rights in the *peculium* of the *filiusfamilias*, should it appear, in consulting the authorities, sometimes to involve contradictions, these are to be explained by the progressive curtailment of the paternal power.

A slave could not possess any thing of his own. While the advance of civilization and refinement gradually softened the position of the *filiusfamilias*, the slave remained incapable of the smallest rights; all that he acquired belonged to his master. Still he was allowed his *peculium*, which arose in this way. The slaves received their rations once a month, thence called their *menstruum*, which consisted of five measures (*modii*) of corn, and five *denarii*. Whatever by care and economy they could save from this constituted their *peculium*, which they were allowed to possess; and by extreme parsimony they sometimes acquired enough to purchase a *servus vicarius*, whom they let out to hire. The slave's *peculium*, like himself, was also liable to his master's creditors, if he became insolvent¹. If a slave were appointed heir by testament he could not accept the office without his master's permission, because it might prove a *dam-nosa hereditas*, and thereby bring loss to his master. If he accepted with his master's permission, whatever was the benefit vested in the master. Property could be acquired by a slave of whom one had only the usufruct, but this was confined to such things as arose from the slave's ordinary labour; and if the slave were appointed *heres* in a testament the benefit went to his owner, not to the usufructuary. Freemen were sometimes reduced to a servile state from debt, and so condemned to serve their creditor. *Liber homo bona fide serviens* is an expression often occurring; and whatever their work produced belonged to the person whom they served. All this is clearly explained by Gaius², to whom the reader is referred.

¹ Hein. *Ant.* II. 9. 3.² Gai. II. 86—95.

CHAPTER V.

Of the Civil Modes of acquiring Property.

WE have already explained in the second chapter of this book the mode of acquiring property by the law of nations, we must now consider those methods which have arisen from the Civil law.

CHAP.
V.

The Civil modes of acquiring a right in things were chiefly three:—1. Usucapion or Prescription. 2. Donation. 3. Succession.

Civil modes
of acquiring
Property.

1. *Usucapio est adjectio dominii per continuationem possessionis temporis lege definiti*¹: a mode of acquiring property by means of a continuous possession for a period determined by law. Usucapion dates from the Twelve Tables, where it is termed *usus auctoritas*, which provided that the possession of land for the space of two years, or of moveable property for the space of one year, should establish the title of the *bona fide* possessor. *Usus auctoritas fundi biennii, ceterarum rerum annuus usus esto*. In the early period of the republic this *statuti temporis spatium*² was deemed a sufficient allowance of time for proprietors to claim their property; if they failed to do this the *bona fide* possessor might avail himself of the power which the law gave him, and for ever exclude the original owner. The thing must be possessed *bona fide; nec vi, nec clam, nec precario*. Hence a thing stolen could never be acquired by usucapion, though this was at first interpreted to apply to the thief only; therefore the *Lex Atinia* was passed, whereby it was decreed that stolen property, though it came into the hands of a *bona fide* possessor,

Usucapio.

Usus auctoritas.

Lex Atinia *Att. 197*
BC. 196

¹ D. XLI. 3. 3; Ulp. Frag. XIX. 8.

² D. XLI. 3. 1.

BOOK
II(Leges
Julia and
Plotia.

B.C. 88.

could never be capable of usucapion unless it had returned to the possession of the original owner¹. This applied to moveable property only, and the principle was subsequently extended to *res vi possessæ* by the leges *Julia* and *Plotia*, passed about the year U.C. 665², whereby persons violently dispossessed of lands and immoveables, might make good their claim at any distance of time.

The very short time allowed for usucapion might be sufficiently adapted for the state of society when the Twelve Tables were published; in process of time, however, it began to produce injustice, and to lead to frauds: accordingly about the year A.D. 220 we find both Ulpian and Paulus, who were contemporaries, speaking of *longæ possessionis prærogativa*³, and *longæ possessionis præscriptio*⁴; and which Paulus says was, with regard to immoveable property, *inter præsentis decennii inter absentes vicennii spatio continuo*⁵. This is the *præscriptio longi temporis* which had been gradually arising.

Præscriptio.

*Præscriptio est exceptio qua is qui rem longo tempore possederat, sese adversus dominum tuebatur*⁶; a plea whereby he who possessed a thing for a long time defended himself against the owner of the property. The old usucapion was enacted by the Twelve Tables, and therefore was a matter of strict law; the extended period of *præscriptio* must at first have rested upon the *interpretationes prudentum*, aided by the equity of the Prætor, and so continued till Justinian settled the law. *Vetustas*, says Paulus, *pro lege habetur minuendarum scilicet litium causa*⁷. Long and uninterrupted possession, or usage, established the title of the *bona fide* possessor, i.e. he who had received the thing as a gift, or as a purchase from one whom he believed to be the proprietor⁸. But an error in law is fatal,

¹ D. XLI. 3. 4. 6.² D. XLIII. 19. 5. 3.³ R. S. v. 2. 3.⁷ D. XXXIX. 3. 2.³ D. XLI. § 33. 2.⁴ D. XVIII. 1. 76. 1.⁵ Hein. El. 438.⁸ D. L. 16. 109.

because *juris ignorantia non prodest*¹. Justinian finally abolished all distinction between usucapion and prescription, as well as between *res Mancipi* and *nec Mancipi*, and decreed that the *longi temporis possessio* should be fixed at three years in things moveable, and ten years in things immoveable, if the owner were *in civitate*, and twenty if he were absent; and he made the law of prescription to apply equally to incorporeal as to corporeal property².

CHAP.
V.

Justinian's
alteration.

To make a title good by prescription there must be an original *bona fide* possession³, founded on a *justus titulus*, and the possession must be continuous for the period required by law.

What necessary to
make a
good title.

Usurpatio was the interruption of possession before the necessary time for establishing the prescriptive right was accomplished⁴. During *usurpatio* the time counts if the claim of the usurper be bad⁵.

Usurpatio.

There was also the *præscriptio longissimi temporis*, of thirty, forty, and a hundred years. Thirty years applied to cases of *mala fides*, and defective titles; forty years to public property, or that of the emperor⁶; and an hundred years to the church⁷.

Longissimi
temporis.

The civil law of any state might justly be said to be very imperfect that possessed not these statutes of limitation. The reason assigned for them by the Romans was *ne rerum dominia in incerto essent*; and no one had a right to complain who thus lost his property, for *videtur alienare qui patitur usucapi*⁸.

Reason-
ableness of
the Law.

2. *Donatio*, a gift, is classed among the civil modes of acquiring property: *Donatio est liberalitas in accipientem nullo jure cogente collata*⁹; when one from mere liberality bestows any thing on another,

Donatio,
definition.

¹ D. XLI. 3. 31.

² C. VII. 31; C. VII. 33. 12.

³ I. II. 6. pr.; D. XLI. 4. 2.

⁴ D. XLI. 3. 5.

⁵ D. XLI. 6. 2.

⁶ C. VII. 39.

⁷ Nov. 9.

⁸ D. L. 16. 28.

⁹ Hein. *El.* 455.

BOOK II. not being compelled to do so by law, or induced as the requital of services.

Donations were, 1. *Inter vivos*. 2. *Mortis causa*. 3. *Propter nuptias*.

Inter vivos. Justinian decreed that a *donatio inter vivos* was a civil mode of acquiring property. The gift was complete as soon as the donor had expressed his intention either verbally or in writing¹, and he was bound to make the delivery². If the gift exceeded 500 solidi in value it must be registered³. To make a gift perfect there must be the consent of the donor and donee; the donor must have the power of alienation, and the thing itself must be that which is capable of transfer.

How executed.

As a general rule a *donatio inter vivos* unaccompanied by any condition was irrevocable, and it is so absolutely by the law of England; but the Civil law makes it revocable in the following cases: First, if the donor disposed of more than three-fourths of his estate, and did not leave a clear fourth part to the heir; secondly, if any condition were annexed, and the donee failed to fulfil it; thirdly, if the donee was guilty of *insignis ingratitude* towards the donor, as where he injured him by fraud or slander; fourthly, the gift not being duly registered; and lastly, in the case of the *patronus* who had made over his estate to his *libertus*, having no children, if he had a child born afterwards the gift was thereby rescinded by a constitution of Constantine⁴. Though the justice of this has been questioned it comes within the rule that the heir-presumptive must give way to the heir-apparent.

When revocable.

Mortis causa. A *donatio mortis causa* is thus defined by Marcianus: *Mortis causa donatio est cum qui habere se vult, quam eum cui donat: magisque eum cui donat, quam heredem suum*⁵: when a man, moved by the consideration of death in a serious

Definition.

¹ I. II. 7. 2.

² C. VIII. 54. 35. 5.

³ C. VIII. 36. 3.

⁴ C. VIII. 56. 8.

⁵ D. XXXIX. 6. 1.

illness, or when going to undertake a dangerous enterprise, gives to the donee that which he had rather retain himself, but which he wishes the donee should possess rather than his own heir. Every one could make this donation who could make a will, and all could take it who could take a legacy¹. It must be made in the presence of five witnesses present at the same time². It was not complete unless followed by the death of the donor. A *filiusfamilias* could make this gift with the permission of his father³.

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V.

How executed.

A *mortis causa donatio* in some respects differs from a legacy, but there is no practical distinction.

Donatio propter nuptias, called before the time of Justinian *donatio ante nuptias*, because, except in certain cases, no gift could be made by the husband to the wife after marriage. This was a gift made by the husband to the wife on account, or in contemplation, of marriage. The woman on the occasion of her marriage brought her *dos*, property in some form, of which the husband had the use, and which usually was to be returned at the death or divorce of the wife; and the *donatio propter nuptias* was considered a security, caution money, for the *Dos*, if the husband failed to account for it. This donation might be made after marriage⁴; if made before marriage and the marriage did not take place it must be returned⁵.

Donatio
propter
nuptias.

Munus differed from *donum* because it was that which was given *officii causa*, whereas *donum* was *liberalitas in accipientem collata, nullo jure cogente*. *Munus* differed from *donum* as the *species* from the *genus*. *Munera* were given at the beginning of the new year called *Strenæ*, on birth-days, and wedding-days; also by clients to their patrons, and were carried to such an extravagant extent that the *Lex Cincia* was passed A.U.C. 550, called the *Lex Cincia*. *Lex muneralis*, preventing *munera* altogether in

Munus.

¹ D. XXXIX. 6. 15. 9.

² C. VIII. 57. 4.

³ D. XXXIX. 6. 25.

⁴ C. V. 8. 20.

⁵ C. V. 3. 2.

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II.

some cases, and fixing the sum to be paid to an advocate for his services. It also required that *munera*, when bestowed on certain persons, should be accompanied with mancipation¹.

Dos.

Dos signified the property which the woman contributed on the occasion of the marriage towards meeting the expenses of the household. It

Definition.

is defined as *pecunia data marito ad sustinenda matrimonii onera*. It did not necessarily consist of money, it might be cattle, slaves, or land, or all of these. The word itself is incapable of translation; some have called it dower, but this creates confusion, because it signifies the right of maintenance of the English widow out of her husband's estate. The *Dos* was settled before the marriage between the *sponsus* and the father or tutor of the *sponsa*. Sometimes this was done in writing, called the

Instrumenta dotalia.

instrumenta dotalia.

Dos dabatur;

The *Dos* either *dabatur*, *dicebatur*, or *promittitur*. *Dabatur*: this was when it was paid down in money, or handed over to the husband. In the

dicebatur;

former case the money was sealed up in a bag and placed with the *Auspex*², who delivered it to the husband the day after the marriage. *Dicebatur*:

promittitur.

here the *dos* was declared thus, *Dos est decem talenta*, to which the *sponsus* replied, *Accipio*³. *Promittitur*: this was where the *dos* was secured by a stipulation payable by instalments in one, two, and three years⁴. When the *dos* consisted of property that was of a nature to become deteriorated by use, such as cattle or slaves, it was *æstimata*, valued at the time of delivery: so that the husband in such case could dispose of it, but was bound to return the value.

Profectitia and adventitia.

The *dos* was *profectitia*, or *adventitia*: the former was what was given by the father of the bride, the latter was every thing that was derived from any other source. As a general rule the *dos profec-*

¹ Hein. *Ant.* II. 7. 10.

² Juv. *Sat.* X. 333.

³ Hein. *Ant.* II. 8. 6.

⁴ Hein. *Ant.* II. 8. 5; Ulp. *Fr.* VI. 13a.

titia was returned on the death of the wife to her father¹: the *adventitia* became the property of the husband; the father of the wife could have no claim to it. This was the general rule, but the *instrumenta dotalia* contained provisions on this subject varying as the parties agreed. Sometimes the husband was to retain the *dos profectitia*, or a moiety of it, if the wife died leaving children². These nuptial settlements might take place after as well as before marriage, and exhibited all the varieties of station and circumstances of the parties concerned³. Sometimes the giver of the *dos adventitia* stipulated that it should be returned on the dissolution of the marriage; this was called *dos receptitia*. CHAP.
V.

The right of the husband over the *dos* is expressed in the definition *ad sustinenda matrimonii onera*; he had therefore the full usufruct during the marriage; but he could neither sell nor mortgage the *fundus dotalis* even with the wife's consent, by the *Lex Julia*. Right of the
husband
over the
Dos.

If the farm were in the provinces he could sell, but not mortgage. Justinian forbade this⁴. The husband was allowed to alienate the *mancipia*, chattels attached to the *dos*; he might therefore manumit a slave who formed part of it, because as he was valued at the same time he received him he must deposit the money, or substitute a slave of equal value⁵.

It was not incumbent upon the woman to deliver over all her property as *dos*, though this, probably, was generally done. If any part were reserved it remained under the trust of her father, or tutor; and this was termed *paraphernalia*, which is defined as *bona quæ præter dotem uxor habet*. The husband had no right to this beyond what the wife might grant him. If the wife had any part of her Parapher-
nalia.

¹ D. XXIII. 3. 6.

² D. XXIII. 4. 26. 2.

³ D. XXIII. 4. 1; and see the whole title.

⁴ I. II. 8.

⁵ C. v. 12. 5; D. XXIII. 3. 42.

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II.

paraphernalia consisting of chattels in the house, the husband had the use of them; but Ulpian says, she made an inventory of them, which the husband signed, and she kept it for her security¹. The *paraphernalia* might consist of any amount of property, and, therefore, differed widely from the same subject in the English law, which comprises only the wife's wardrobe and jewels.

Liabilities
of the
husband
as to the
Dos.

The husband was liable for any neglect in taking due care of the *dos*: if he exercised the same care about it that he did with regard to his own property, as a *bonus paterfamilias*, he was not liable for *culpa levis*²; but he must answer for *culpa lata*, or gross negligence, and bear all the burdens consequent upon the enjoyment of it. Upon the dissolution of the marriage, either by divorce, or the death of the husband, the wife was entitled to the restitution of the *dos*, which she could enforce by the *actio rei uxoriæ*. Justinian abolished this, and substituted the *actio ex stipulatu* instead, as stated in the Institutes³. If the wife died before the husband the *dos* went back to her family, notwithstanding children were left, unless otherwise agreed upon⁴.

Actio rei
uxoriæ.

Gifts be-
tween hus-
band and
wife.

Gifts between husband and wife were either impossible, or forbidden. In the case of the *conventio in manum* they were impossible⁵, on account of the *unitas personæ*; where there was no *conventio in manum* they were forbidden, lest, as Ulpian says, *mutuato amore invicem spoliarentur*⁶. But a *donatio mortis causa*, or *divortii causa*, was valid, because, in either case, the relation of husband and wife ceased at the time the gift took effect. The wife might confer on her husband whatever was necessary to enable him to assume the senatorial dignity, or any other public honour⁷.

¹ D. XXIII. 3. 9. 3; C. V. 14. 8.

² D. XXIV. 3. 25. 5; D. XXIII. 3. 17.

⁴ D. XXIII. 4. 26. 2.

⁶ D. XXIV. 1. 1.

³ I. IV. 6. 29.

⁵ D. XXIV. 1. 3. 10.

⁷ D. XXIV. 1. 40.

But a gift from the husband to the wife became valid at his death, so far that the heir could not recall it where the donor had not done so in his lifetime¹.

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V.

A gift from a father to his unemancipated son was also invalid on account of the *Unitas personæ*, and at the death of the father would go to the *Heres*, unless he made it a legacy to the son in his will.

Between
Father and
Son.

Besides those methods of acquiring property by the Civil law which we have now explained, viz. *mancipatio*, *usucapio*, *præscriptio*, and *donatio*, the following must also be noticed, though they are omitted by Dr Hallifax. These are *In jure cessio*, *Sub corona emptio*, *Auctio*, *Adjudicatio*, and *Lex*.

In jure cessio. This was, in fact, the conveyance of property from one to another by means of a fictitious suit. Three persons were concerned in the ceremony—the sham plaintiff, the sham defendant, and the Prætor. The plaintiff, who was either vendee or donee, *vindicabat rem*. The defendant, who was vendor or donor, *cedebat rem*, and the Prætor, in whose presence this was done, *addicebat*, decreed that the property belonged to the plaintiff². This gave the vendee or donee the strongest legal title he could acquire.

*In jure
cessio.*

Sub corona emptio. This was the public sale of prisoners and plunder taken from the enemy, and gave the buyer full legal possession³.

*Sub corona
emptio.*

Auctio was nothing but the modern sale by auction. *Qui plurimum auget*, he who bid the highest had the lot knocked down to him. These two last-mentioned modes of acquisition necessarily took place before a number of witnesses, which gave the transaction sufficient notoriety⁴.

Auctio.

Adjudicatio. Here property was acquired, or accurately defined, by the decision of a judge, and

*Adjudica-
tio.*

¹ C. v. 16. 35.

² Ulp. *Fr.* 19. 9; Gai. II. 24.

³ Hein. *Ant.* 2. 1. 24.

⁴ Id. II. 1. 25.

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II.**

BOOK II. principally applied to the three actions, 1. *Familiæ erciscundæ*, the dividing an estate among a certain number of coheirs. 2. *Communi dividundo*, the apportioning the property of partners according to their respective shares. 3. *Finibus regundis*, settling the boundaries of estates. By this, property immediately vested in the person to whom it was adjudged¹. And, lastly, *Lege*. A legacy is an example of this. If the testator leave a legacy in a will rightly made, it vests by law in the legatee at his death.

¹ Ulp. *Fr.* 19. 16.

1. *Amphibia*
 2. *Reptiles*
 3. *Birds*
 4. *Mammals*
 5. *Fish*
 6. *Insects*
 7. *Arachnids*
 8. *Mollusks*
 9. *Crustaceans*
 10. *Plants*
 11. *Fungi*
 12. *Algae*
 13. *Bacteria*
 14. *Viruses*
 15. *Protozoa*
 16. *Parasites*
 17. *Endoparasites*
 18. *Exoparasites*
 19. *Internal parasites*
 20. *External parasites*
 21. *Helminths*
 22. *Insects*
 23. *Arachnids*
 24. *Mollusks*
 25. *Crustaceans*
 26. *Plants*
 27. *Fungi*
 28. *Algae*
 29. *Bacteria*
 30. *Viruses*
 31. *Protozoa*
 32. *Parasites*
 33. *Endoparasites*
 34. *Exoparasites*
 35. *Internal parasites*
 36. *External parasites*
 37. *Helminths*
 38. *Insects*
 39. *Arachnids*
 40. *Mollusks*
 41. *Crustaceans*
 42. *Plants*
 43. *Fungi*
 44. *Algae*
 45. *Bacteria*
 46. *Viruses*
 47. *Protozoa*
 48. *Parasites*
 49. *Endoparasites*
 50. *Exoparasites*
 51. *Internal parasites*
 52. *External parasites*
 53. *Helminths*
 54. *Insects*
 55. *Arachnids*
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 57. *Crustaceans*
 58. *Plants*
 59. *Fungi*
 60. *Algae*
 61. *Bacteria*
 62. *Viruses*
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 99. *Internal parasites*
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 105. *Crustaceans*
 106. *Plants*
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 187. *Fungi*
 188. *Algae*
 189. *Bacteria*
 190. *Viruses*
 191. *Protozoa*
 192. *Parasites*
 193. *Endoparasites*
 194. *Exoparasites*
 195. *Internal parasites*
 196. *External parasites*
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 198. *Insects*
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 223. *Protozoa*
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 225. *Endoparasites*
 226. *Exoparasites*
 227. *Internal parasites*
 228. *External parasites*
 229. *Helminths*
 230. *Insects*
 231. *Arachnids*
 232. *Mollusks*
 233. *Crustaceans*
 234. *Plants*
 235. *Fungi*
 236. *Algae*
 237. *Bacteria*
 238. *Viruses*
 239. *Protozoa*
 240.

CHAPTER VI.

Of Succession by Testament.

3. PROPERTY naturally ceases at the death of the proprietor, but by the civil law it may be continued by him after his decease, in such persons as he shall expressly name, provided he strictly observes those forms and ceremonies which the law deems requisite; and, therefore, a testament in the Roman law is the *legal* declaration of a man's intentions, which he wills to be performed upon the event of his death, with the direct appointment of an heir. Ulpian thus defines a testament: *Testamentum est mentis nostræ justa contestatio, in id solenniter facta, ut post mortem nostram valeat*¹; the force of which definition the reader will better understand when he has considered the formalities required by the law when Ulpian wrote.

CHAP.
VI.

*Definition
of a tes-
tament.*

Wills would naturally exist in every community long before the Civil law invested them with those legal formalities, which have been imposed for the purpose of preventing fraud, and insuring the observance of the testator's *Ultima voluntas*. According to Vinnius², testaments have their origin from the law of nations, but derive their forms from the Civil law.

*Origin of
testaments.*

Before the Twelve Tables the Roman Law did not recognize the right of private testamentary disposition. The law prescribed the rule of succession, which it was not competent for a private citizen to alter, because *nihil tam naturale est quam eo genere, quidve dissolvere quo colligatum est*³; and, therefore, it was necessary for a childless

*Testaments
before the
12 Tables.*

¹ Ulp. *Frag.* XX. 1 See also Modestinus. *D.* XXVIII. 1. 1.

² Vin. *Com.* II. 10. pr.

³ *D.* L. 17. 35.

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— 1

citizen to obtain the sanction of the legislature to constitute a stranger successor to his estate. This was done in the *Comitia Calata*, before the whole legislative body, the Pontifices being present.

1. In comitiis calatis.

The presiding magistrate put the question in this form: *Velitis jubeatis quirites uti L. Valerius L. Titio tam jure legeque filius sibi sit quam si ex eo patre matreque familias ejus natus esset utique ei vita necisque in eum potestas sit uti patri endo filio est. Hæc ita uti dixi ita vos Quirites rogo*¹. As it was a matter of no importance to any one, but the proposed successor, how the estate of Lucius Titius was disposed of, the vote passed as a matter of course. The *Comitia* for making wills were held twice a year². Coeval with this form of testament

2. In Procinctu.

was that made by soldiers in *Procinctu stantes*, in marching order, preparing for battle; they named their heirs in the hearing of three or four witnesses, and these wills were valid as long as the expedition lasted³. Gaius⁴ informs us that another mode of making a will existed, called *per æs et libram*, and which was contemporary with those made in *comitiis* and in *procinctu*. Since the former could only be made twice a year persons in fear of imminent death mancipated their estates to some friend *per æs et libram* requesting him, who was called *familias emptor*, to dispose of it according to their directions after their death. This person was *heres*, and administered the estate according to the directions received from the deceased; but this private arrangement could not have been recognized as a will by the law before the time of the Twelve Tables. The free right of private testamentary disposition dates from the year u.c. 304. The Twelve Tables declared as follows:—*Paterfamilias uti legassit super familia pecunia tutelave suæ rei ita jussus esto*. The execution of a will is a most essential

Testamentum per æs et libram before 12 Tables.

Enactment of 12 Tables.

¹ Hein. *Ant.* II. 10. 3.

² Gai. II. 101.

³ Id.

⁴ Id. 102.

part of it, but the above laconic law was altogether silent on that point, and therefore it devolved upon the *Jurisconsulti* to devise the ceremonial formalities which the testator should be bound to observe if he wished his will to be valid. They adapted the existing mode of transfer *per æs et libram*, of which Gaius speaks, to the first legal private will of the Romans, which was therefore called *Testamentum per æs et libram*.

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There were present at the ceremony the *Familiæ emptor*, the imaginary purchaser of the *hereditas*, the *Libripens*, the *Antestatus*, and five witnesses, Roman citizens of full age, in whose presence the sale took place. The sale having been duly made *per æs et libram*, the testator then made his *nuncupatio testamenti* in the presence of the witnesses in this form: holding up the waxed tablets in his hand upon which he had written his will, he said as follows: *Hæc uti in his tabulis cærisve scripta sunt, ita do, ita lego, ita testor, itaque vos Quirites testimonium præbitote*¹. The antestatus then stepped forward and touched the ears of the witnesses; but neither their seals nor signatures were required. It was therefore like the ceremony of mancipation in which the *hereditas* was mancipated to the *familiæ emptor*, who was an imaginary purchaser like the *Pater fiduciarius*.

Testamentum per æs et libram, after 12 Tables. How made.

We have observed that before the Twelve Tables the *familiæ emptor* performed the part of *heres*, and administered the testamentary bequests of the *Paterfamilias*, but after the Twelve Tables he became a mere man of straw as necessary for the formal ceremony of the *mancipatio per æs et libram*²; but the will then contained the name of him who was appointed by the testator as *heres*, and who administered the estate of the deceased.

Familiæ Emptor.

In process of time the Prætor introduced a change. The formal mancipation was discontinued, and the testator *nuncupabat testamentum* in the

Testamentum Prætorium.

¹ Hein. *Ant.* II. 10. 7.

² Gai. II. 103.

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II.

presence of seven witnesses; two being added in the place of the *libripens* and the *familiæ emptor*.

Testamen-
tum mix-
tum.

Mode of
execution.

These were simply required to affix their seals. This form of will seems only to have given the *bonorum possessio* to the *heredes scripti* provided there were no heirs at law to claim the property¹. It appears from a passage in Ulpian² that the ceremony of executing a will *per æs et libram* existed in his time, and it was not until the time of Theodosius II. that the Roman will assumed its last form—the *testamentum solenne privatum*, called also *testamentum mixtum*, because made up of the Civil law, the Prætorian Edicts, and the Constitutions of the emperors³. In the execution of this will the following requisites must be strictly observed: 1. It must be executed *uno contextu*⁴, i.e. it must be one continuous act between the testator and the witnesses; and no irrelevant matter must be allowed to intervene. 2. Seven witnesses⁵ must be present, *specialiter rogati*, specially summoned, whereby the transaction would be more likely to be remembered by them; a custom derived from the time when they came with the *Antestatus* in the ancient ceremony of mancipation. 3. The witnesses must all sign and seal the will⁶. 4. The testator must sign his will, unless he wrote the whole himself, in which case it was called a holograph; and as he must begin thus, *Ego Lucius Titius hoc meum testamentum feci*, &c., it was immaterial whether his signature was at the commencement or the end⁷. If the testator could not write he must specially depute a person to sign for him. 5. An heir must be duly named in the will, or it was void.

Appoint-
ment of an
heir.

The heir was to represent the person of the deceased and was the necessary conduit pipe between

¹ Gai. I. 119.

² Hein. *Ant.* II. 10. 14.

³ *I.* II. 10. 3.

⁴ *Frag.* XX. 2.

⁵ *D.* XXVIII. 1. 21. 3.

⁶ *I.* II. 10. 3.

⁷ *C.* VI. 23. 28. 1.

him and the legatees. If he died before the testator, or were unable, or unwilling, to enter on his duties, the estate fell to the heirs-at-law, the legacies were all void, and the deceased died intestate¹, of which more hereafter. The appointment of the heir was called the *solennitas interna*, the other observances necessary to the due execution of the will were denominated the *solennitates externæ*.

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As to the competency of witnesses the following persons were disqualified from attesting a will. *Impuberes, furiosi, prodigi*, slaves, deaf and dumb persons, and women. The *patria potestas* prevented a son from witnessing his father's will, and *vice versa* on account of the *unitas personæ*. The witnesses must be satisfied that the document which they attest is the will of the testator, and they must sign in the presence of each other, and in *conspectu testatoris*². Neither the heir, nor any of his family, could be witnesses; but legatees and fide-committees might. The omission of any solemnity in a written unprivileged will made the whole invalid.

Incompe-
tency of
witnesses.

A nuncupative will was that made without writing, where the testator being unexpectedly visited with the imminent peril of death declares his will in the presence of seven witnesses; this was a valid testament³, and would remain a nuncupative will, though afterwards reduced to writing for the purpose of preserving the testator's intentions.

Nuncupa-
tive will.

Privileged testaments were those which were valid without the formalities required in such as were solemn. Among these the military testament was the chief⁴.

Privileged
Testa-
ments.

Secondly, *Testamentum tempore pestis factum*; where the testator was dying from some contagious disease, the presence of the witnesses at one and the same time was dispensed with, provided the

Contagious
disease.

¹ D. L. 17. 181.

² C. VI. 23. 9.

³ C. VI. 23. 26.

⁴ See ante.

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II.Parents
and chil-
dren.

will were attested by seven witnesses in the presence of the testator¹.

Thirdly, *Inter parentes et liberos*. In the will of a parent where the property was divided among the children only, if the testator wrote the will, or signed it, if written by another hand, in which the year, month, and day of the execution are set forth, and the portions of the children are clearly expressed no witnesses were required². If a legacy were left to a stranger in such a will it would be void. In a nuncupative will between parents and children two witnesses were sufficient.

Wills of
Rustics.

Fourthly, *Inter rusticos*. In this case five witnesses were sufficient if seven could not be found, and one witness might sign for those who could not write³, on account of the illiteracy of the peasants.

Wills re-
gistered.

Fifthly, wills publicly registered, *actis insinuata*, required no witnesses⁴.

In pios
usus.

Sixthly, *In pios usus*, where property was left for religious purposes the pontifex could dispense with all formalities.

Persons
unable to
make wills.

Persons unable to make wills were the following: They who were under the age of puberty, or had lost the rights of citizenship. Prisoners of war. A *filiusfamilias*, unless he were a soldier, and he could then bequeath his *peculium castrense* and *quasi castrense*. Madmen and prodigals, deaf and dumb persons⁵. Women during the Republic; but in the empire they were allowed to make their wills if they were *sui juris* with the advice of their Guardians⁶.

Necessity
for the ap-
pointment
of the
Heres.

A Roman will, if it did not contain the appointment of an heir, or if a duly appointed heir was unable, or refused to act, was utterly void. This was the *solennitas interna*, the omission of which nothing could mend.

Definition.

Heres est successor in universum jus quod de-

¹ C. VI. 23. 8.² C. VI. 23. 31.³ I. II. 12.⁴ C. VI. 23. 21. 1.⁵ C. VI. 21. 19.⁶ D. XXXII. 37. 6.

*functus habuit*¹. And here the distinction must be observed between the *heres institutus*, and the *heres legitimus*. The former was he who was appointed in the will, and without whom the will was necessarily void. He represented the deceased, and was the connecting link between him and the legatees, and creditors of the estate; and was in all respects the same as the executor of the English law.

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The *heres legitimus* was he to whom the property of the deceased came by operation of law when he died intestate. *Heres legitimus.*

There were three kinds of heirs in the Roman law: 1. *Necessarii*. 2. *Sui et necessarii*. 3. *Extranei*.

1. Necessary heirs were the testator's slaves. If he instituted his slave as heir, and he remained his slave at the time of the testator's death, he became his *heres necessarius*, and was bound to enter upon the duties of *heres*; nor is it to be supposed he would require any compulsion, since the appointment, if he were the sole property of his master, involved his freedom. Insolvent testators often appointed a slave as heir, because at their death the property vested in the heir, and was sold in his name, and so they avoided the *ignominia* which they would have otherwise have incurred². The testator might appoint a *servus alienus*, i. e. one in whom he had only the usufruct, while the *nuda proprietas* was in another. In such case it became a question with the owner of the slave whether he would allow him to act as *heres*; for as any benefit accruing therefrom belonged to the master, so if perchance it were a *damnosa hereditas* he would have to bear the loss. Here the slave did not necessarily acquire his liberty, but he was considered rather as the instrument whereby his master acted³. *Heres necessarius.* *Servus alienus.*

If a *servus communis* were appointed heir, i. e. *Servus communis.*

¹ Hein. *El.* 534.

² Gai. II. 154.

³ *D.* XXVIII. 52. 31. *Vin.* II. 14. pr. 3.

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II.

Servus hereditarius.

Heredes sui et necessarii.

where he was the joint property of several, whatever benefit arose was divided equally among the several owners in proportion to their shares; but if the testator at the same time declared him *heres et liber* the slave then gained his liberty, and the co-proprietors were obliged to take the price of their respective shares to be fixed by the Prætor¹. The *servus hereditarius* was a slave belonging to an estate the owner of which had died intestate, and the heir-at-law had not yet made his appearance. If any one named such a slave *heres* in his will the slave was considered as having sufficient legal capacity to act derived from his deceased master, and so what he acquired was an addition to the *hereditas*.

2. The *heredes sui et necessarii* were all the children of the testator of whatever sex or degree, born or posthumous. The children of the deceased were called *sui heredes* because the Roman law considered a man's children in somewhat the same position as those of the English tenant in tail where the entail was not barred: *quia domestici heredes sunt, et vivo quoque parente quodammodo domini existimantur*². They were also called *necessarii* because *omnimodo sive velint, sive nolint tam ab intestato quam ex testamento heredes fiunt*³.

But when it is said that all who were in the power of the deceased at the time of his death were *sui heredes*, it must be observed that the distribution of the estate and effects did not go beyond those who stood first in degree: e.g. the grandson took nothing from his grandfather's property, unless his father were dead at the time of the grandfather's decease⁴. The wife, if *in manu*, shared as an unmarried daughter, but all emancipated children, and daughters who had passed out of the family by marriage ceased to be *sui heredes*.

¹ C. VII. 7. 7.² Id.³ Gai. II. 157.⁴ Gai. II. 156.

By the old civil law, if a father neither instituted his son heir, nor disinherited him by name, the will was void; but the same omission, says Dr Hallifax, in the case of a daughter, or of a grandson by a son, or by a daughter, did not hurt the will. The principle of equity, which shines so conspicuously in the Roman law, did not permit a father to disinherit his son except it were *nominatim*, and for some just cause¹. But though the omission of the daughter did not render the will void she was not on that account deprived of her share of the estate; for if the father appointed three sons heirs, omitting a daughter, she could claim a fourth part of the estate; and if he appointed extraneous heirs she then took half the estate². Posthumous children were of three sorts: (1.) Sui posthumi. (2.) Alieni posthumi. (3.) Quasi posthumi.

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Consequence of omitting the son in the will of the Father.

(1.) *Suus posthumus* was he who was born after the death of his father.

Suus Posthumus

(2.) *Alienus posthumus* was one posthumous to the testator, who could not be instituted by the Civil law, but the Prætor would grant him the *bonorum possessio secundum tabulas*. He appears to have been the posthumous child of an adopted son³.

Alienus Posthumus

(3.) *Quasi posthumus* was he who was born during the lifetime of the father, but after he had made his will.

Quasi Posthumus

Posthumi were further classed under four heads:

(1.) *Aquiliani*. (2.) *Velleiani*. (3.) *Juliani*. (4.) *Corneliani*.

(1.) The *Aquiliani* were so called from *Aquilius Gallus*, who devised a form by which a grandfather could prevent a grandson, born after his own and the father's death, from voiding the grandfather's will, which was by instituting him in the following manner:

Aquiliani

Form of
Gallus Aquilius

¹ Gai. II. 123.

² Id. 124.

³ D. XXXVII. 9. 1. 12.

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II.

*Filius meus heres esto. Si Filius meus me vivo morietur, tunc si quis mihi ex eo nepos, sive quæ neptis, in decem mensibus proximis quibus filius meus moreretur, natus erit, heredes sunt*¹. By this form the posthumous grandchild was instituted, in case he became a *suus heres* by the previous death of his father; and the validity of the grandfather's will was secured.

Velleiani.

A. 10

(2.) The *Velleiani* were so called from the *Lex Junia Velleia*, which declared that a *quasi* posthumous child born in the lifetime of the father, i.e. one born after he had made his will, should not render the will void if he were disinherited *nominatim*; thus, *posthumus exheres esto*².

Juliani.

(3.) The *Juliani* were grandchildren unborn at the time the grandfather made his will, instituted heirs in that will, and born after its execution in the lifetime of their father; these on the death of their father succeeded to his place³.

Corneliani.

(4.) The *Corneliani* took their appellation from the *Lex Cornelia testamentaria* respecting the wills of those who died while prisoners of war. The posthumous child of such an one rendered the will void⁴.

Voluntarii.

3. *Heredes Voluntarii*, called also *extranei*, were all persons who were not under the power or control of the testator. They were free to use their discretion whether they would accept or refuse the *hereditas*. Those only could be extraneous heirs who had a legal capacity to accept the inheritance at the time of making the will, at the time of the testator's death, and also at the time of entering upon the inheritance⁵.

Testator
must die
wholly tes-
tate.

A testator might institute one heir or several, but no person, except a soldier, could die partly testate, and partly intestate. *Nemo pro parte testatus pro parte intestatus decedere potest*. This was

¹ D. XXVIII. 2. 29.² D. XXVIII. 3. 3. 1.³ D. XXVIII. 2. 29. 15.⁴ D. XXVIII. 3. 15.⁵ I. II. 19. 4.

a rule from which no deviation could be allowed, because the heir was *successor in universum jus quod defunctus habuit*: if therefore the testator reserved any part of his estate from his heir he was not *heres*, and a will without a *heres* was void; therefore a Roman citizen must die wholly testate, or wholly intestate.

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The whole estate of the testator was called the *As*. *The As.* *As*, by which was meant the total of his effects; and this was divided into 12 *unciae*, $\frac{1}{12} = 1$. If one heir were instituted simply he succeeded to the whole. If he were instituted to a part only he still took the whole. If several heirs were instituted, and no shares were assigned to them, they took equally; but if their portions were assigned, and a part of the *As* was left undisposed of, they took this part rateably among them, and *converso*, if the portions assigned amounted to more than the *As* contained, the shares abated in proportion*.

The *As* was divided in the following manner: *How divided.* *Uncia*, one ounce; *sextans*, two ounces, or one-sixth; *quadrans*, three ounces, or one-fourth; *triens*, four ounces, or one-third; *quincunx*, five ounces; *semis*, six ounces, or one-half; *septunx*, seven ounces; *bes*, eight ounces; *dodrans*, nine ounces; *dextans*, ten ounces; *deunx*, eleven ounces; *As*.

The institution of heirs might be absolute or conditional. Conditions were: 1. Casual. 2. Potestative. 3. Mixt. They were also possible and impossible. *Institution of heir absolute or conditional.*

The absolute institution of an heir must be precise, thus, *Titius mihi heres esto*. A conditional institution was where one of the above-mentioned conditions was annexed. A casual condition was that over which the person appointed had no control, as let Titius be my heir if there be an earthquake on the day of my death. A potestative possible condition was that which it was in the *Absolute.* *Conditions.* *Casual.* *Potestative possible.*

* I. II. 14. 5.

* I. II. 14. 7.

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II.

Mist.

Impossible.

Appointment of heir must be absolute.

Cretio.

Vulgaris or continua.

power of the appointed party to perform, as let Titius be my heir if he come from Athens within one month after my decease. A mixt condition consisted of the two former combined, as let Titius be my heir if he beget a son: to fulfil this Titius must first marry; this is within his power; but the child he begets may be a daughter. Impossible conditions which could not be performed, or were forbidden as *contra bonos mores*, were void, as if you will touch the sky with your finger, or if you will kill Mævius.

An heir could not be instituted *from* a certain time, or *till* a certain time. There ought to be no interval between the death of the testator and the succession of the heir; and if he were appointed for a limited period he might be cut short in the midst of his duties, and so the testator would die partly testate and partly intestate.

An heir was obliged to make some declaration of his accepting the inheritance. This was more particularly the case when he was appointed *cum cretione*. The *cretio* was so called, because by the form of the institution the heir was bound within a certain time *cernere et constituere*, whether he intended *adire* or *repudiare hereditatem*. The form of the institution was this,—*Heres Titius esto, cernitoque in centum diebus proximis quibus scieris poterisque, quod ni ita creveris exheres esto*¹. In such case, if the instituted heir chose to accept the inheritance, he must declare his intention to do so in this form,—*Quod me Publius Mævius testamento suo heredem instituit, eam hereditatem adeo cernoque*². If he did not make the declaration within the specified time he was altogether excluded, though he might have begun to act as *heres*.

The *cretio* was either *vulgaris* or *continua*. The *vulgaris* was where the words *quibus scieris poterisque* were added. The *continua* was where these words were omitted, and the hundred days having

¹ Gai. II. 165.² Id. 166.

expired, the party was excluded from the acceptance though he were ignorant of his appointment. When the testator did not add the *cretio* in the words of institution, no time was limited for the acceptance; but if the instituted party did such acts as amounted to *pro herede gestio*, e.g. the ordering and disposal of the effects of the deceased, this was a constructive acceptance, and he was bound to proceed¹.

When a *Suus heres* entered upon his duties he was said *immiscere se hereditati*; if by leave of the Prætor he declined to act², he was said *abstinere*. The like acts on the part of the *heres extraneus* were represented by the terms *adire*, and *repudiare*.

By the old law the heir was bound to meet all the liabilities of the estate if he once accepted, and, therefore, a certain time was allowed him to deliberate whether he would undertake the office or not. This was granted by the Prætor, and was called the *jus deliberandi*. The time allowed was nine months, but by application to the emperor it might be extended to a year³. This was superseded by the *Beneficium inventarii*, introduced by Justinian, by which, if the heir made a correct inventory of the property, he was not liable to the creditors *ultra vires hereditarias*⁴. This inventory must be commenced within thirty days, the time to be computed from the period when the heir knew of his appointment, and sixty days were allowed for its completion. Thus the heir was secured from all risk; for then, if there were any deficiency, he was not liable.

Before the introduction of the *Inventarium* the office of heir was frequently refused as dangerous. Men shrunk from what, after all circumspection, might prove a *damnosa hereditas*; and testators

¹ Hein. *Ant.* II. 17. 16. Ulp. *Frag.* XXII. 26.

² *I.* II. 19. 2.

³ *C.* VI. 30. 22. 13.

⁴ *C.* VI. 30. 22. 2.

BOOK II. fearing this, resorted to the practice of substitutions.

*Substitutio,
Form of.*

*Substitutio est institutio heredis secundi, tertii, quarti, in locum deficientis primi*¹. Thus *Titius mihi heres esto, si Titius heres non erit tunc Gaius esto, &c.*, and so for any number. If Titius for any reason was unwilling or unable to accept the inheritance Gaius might do so.

Substitutions were of three kinds: 1. Vulgar. 2. Pupillar. 3. Quasi Pupillar.

1. *Vulgar.*

1. The Vulgar substitution was that described above, where, if Titius declined, or if he died before the testator, or was incapacitated in any way, Gaius might accept. In the vulgar substitution, if the instituted heir accepted, the chances of those substituted were at an end, because in case of his death his heirs succeeded. Several might be substituted in the place of one instituted, and *e converso*, the persons substituted might also be the same with those who were instituted; thus *Seius, Sempronius et Titius heredes sunt, si quis eorum heres non erit tunc reliquorum qui velerint heredes sunt*. This was called a reciprocal substitution. In a reciprocal substitution if the testator omitted to express the parts into which he divided the inheritance, they were understood to be the same as he had expressed in the institution.

2. *Pupillar.*

2. The Pupillar substitution² was where the *paterfamilias* instituting his children heirs who were under the age of puberty, and who might die before him, or succeeding him, might die before they had reached that age, substituted an heir in case of either event, thus: *Titius filius meus mihi heres esto. Si filius meus mihi heres non erit, sive heres erit, et prius moriatur quam in suam tutelam venerit, Seius heres esto*³. The object was to set aside the heirs-at-law of the children, and the substituted heir became heir to the father, or to the children, as the case might be.

Form of.

¹ Hein. *El.* 551.

² *D.* XXVIII. 6. 2.

³ *Gai.* II. 179.

In the pupillary substitution the father must necessarily make his own will, and if that should be invalid the substitution was void. When the child died in infancy the substitute succeeded to the whole estate, viz. that of the father, and the *peculium* of the child also, excluding the heir-at-law¹.

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3. The Quasi Pupillar substitution was in the case of insane persons and idiots, where the testator, leaving his property to them, substituted another heir to succeed if they did not recover from their incapacity. The child need not be under the age of puberty. If such persons recovered from their imbecility of mind, and in that state executed a valid will, the substitution was at an end².

3. Quasi
pupillar.

Testaments were rendered null and void under the following circumstances :

1. A testament was said to be *nullum* where it was void from the outset, e. g. if no heir were named, or children passed over, or the testator were in an unfit state to make his will.

Testamen-
tum nul-
lum.

2. It was *injustum* where the external ceremonies were not duly complied with—as if the legal number of witnesses were not present. This, however; might prove good as a codicil, as we shall see presently.

Injustum.

3. A testament, valid in all particulars, might become *ruptum* under the following circumstances: if a child were born to the testator after the execution of the will; or a posthumous child after his decease; or if he arrogated, or adopted any one; or legitimated a natural child; or if his grandson became his *suius heres* by the death of his father; in all these cases the Roman law declared the will void, thereby securing to the above-mentioned parties their just share of the estate of the deceased.

Ruptum.

¹ D. XXVIII. 6. 10. 2.

² I. II. 16. 1.

BOOK
II.*Irritum.*

4. A testament was said to be *irritum* when the testator, after its execution, suffered any one of the *Capitis diminutiones*; for though the will remained as it was, yet the property of the testator ceased to vest in him, and there was nothing which could pass to his heir.

Destitutum.

5. The testament was *destitutum* when the heir either refused, or was unable, *adire hereditatem*, and so the testator became intestate.

Rescissum.

6. When the Prætor, for some just cause, cancelled the will, it was said to be *rescissum*.

A will was also annulled by the act of the testator, where he cancelled, or destroyed it, or made a new one of later date.

Querela inofficiosi testamenti.

The power of testamentary disposal, given by the Twelve Tables, was at first entirely unrestricted, *uti legassit, &c. ita jus esto*. This soon led to abuses, so that, as a result of family feuds, the children of the testator, who had the first claim to his property, were sometimes left destitute. This ultimately led to a proceeding in the Prætor's court, called the *Querela inofficiosi testamenti*. There are different opinions as to the origin of it. In the absence of all precise information, it may be safely attributed to the *interpretationes prudentum*, aided by the equity of the Prætor's court. A testament was said to be *inofficiosum* whenever a parent disinherited his children without assigning some sufficient cause for so doing¹, or passed them over *sub silentio*. The ground of the proceeding was, that the testator, *quoad* his will, was *non sanæ mentis*, not that he was positively *demens*, because the will in other particulars was well made, but that he could not have been so void of affection towards his children, or have forgotten so solemn an act of justice, unless he were labouring under an aberration of intellect on that point at least². If the Prætor declared the will *inofficiosum* it was

Who could
avail them-
selves of it.

¹ D. v. 2. 3. As to the various causes see Colq. 1301.

² D. v. 2. 2.

ipso jure recisum, and the children had the *bonorum possessio*, as *sui heredes ab intestato*; for if the legacies had been paid they must be refunded¹.

CHAP.
VI.

The *querela* might also be brought by parents against the wills of children². But if the will contained a bequest of fourth part of the testator's effects, there was an end of the *querela*³. The *lex Falcidia* was passed in the year U.C. 714⁴, whereby every testator was bound to leave a fourth part of his estate, clear of all deductions, to his heirs; and in default of this, power was given to them to take it⁵. The *querela* must be brought within five years; and if the claimants could come at the property any other way it was a bar to the *querela*.

Lex Falcidia.

Justinian ordained that where the claimants were four or less the *portio legitima* should be one-third, and where five or more, one-half of the effects of the deceased⁶.

Justinian's alteration.

The codicils of the Roman law were at first nothing more than memorandums or letters addressed by the heir to the testator, directing him to do something after his death, which circumstances subsequent to the execution of the will had rendered necessary or advisable; and as such they possessed no legal force or authority. They appear to have been legalized about the year U.C. 751, when L. Lentulus having made his will, leaving his daughter, and the Emperor Augustus, his heirs, went afterwards as proconsul into Africa, and there made a codicil in which he imposed certain *fidei-commissa* upon the Emperor, whereupon Augustus thought it necessary to consult the highest authorities as to the propriety of confirming such testamentary directions by law. C. Trebatius Testa considering such a course both expedient and consistent with law it was accordingly done: after

Codicils.

¹ D. v. 2. 8. 16.

² D. v. 2. 1.

³ D. v. 2. 8. 6; 8.

⁴ Haub. II. 45.

⁵ Hein. Ant. 2. 20. 19.

⁶ Nov. XVIII. ch. 1.

BOOK
II.

which Labeo made a codicil, and, from his eminence as a lawyer, this removed all doubt as to their validity¹. A codicil is defined as *minus solennis testatoris voluntas*.

Testate and
intestate.

Codicils among the Romans were of two kinds, testate and intestate. If a man had made his will, and afterwards made a codicil for the purpose of explaining, amending, or altering his will, such codicil became part of it, and stood or fell with it; and it was addressed to the *heres institutus*. If he had made *no will* the codicil was addressed to the heir-at-law, and by it *fidei commissa* could be given, but not *legata*², unless it were afterwards confirmed by a will; and no one could be appointed heir, or be disinherited by a codicil. We have no precise information as to the attestation of codicils. We may infer that a testate codicil required no witnesses, but if intestate five were required³.

Codicillary
clause.

Testators fearing their wills might prove invalid, occasionally inserted what was called the codicillary clause, which was to this effect: "If this my will should not be valid as such, it is my wish that it should be taken as a codicil." In which case it stood as an intestate codicil, and the *fideicommissa* were good⁴.

¹ Hein. *Ant.* II. 23. 12. *I.* II. 25.² Gai. II. 270.³ *C.* VI. 36. 8. 3.⁴ *D.* XXXI. 88. 17.

CHAPTER VII.

Legacies.

A LEGACY is a bequest, or gift of goods left by the testator, to be delivered by the heir. CHAP.
VII.

*Legatum est donatio quædam a defuncto relicta ab herede præstanda*¹. Ulpian defines it thus: *Legatum est quod legis modo, id est imperative testamento relinquitur*². A legacy was expressed *verbis directis*, or *imperativis*, as *do, lego*. A fideicommissum³ was *per verba precativa*, as *rogo, quæso*. Definition.

By the old Civil law there were four kinds of legacies: 1. Per vindicationem. 2. Per damnationem. 3. Per præceptionem. 4. Sinendi modo.

1. A legacy left *per vindicationem* was in the following form: *Hominem Stichum do lego*; or *Hominem Stichum sumito*, or *capito*. It was necessary that a legacy thus left should be in the quiritarian possession of the testator at the time of making his will as well as that of his death; and it takes its appellation from the circumstance that on the death of the testator the property vested in the legatee; and if it were not duly delivered to him by the *heres*, or were detained by any one, he could get possession by the *actio vindicationis*, in which he declared it was his *ex jure quiritium*⁴. Legatum
per Vindi-
cationem.

2. The legacy *per damnationem* was in this form: *Heres meus Stichum servum meum dare damnas esto*. By this form the testator could leave *res alienæ*, in which case the *heres* was bound to obtain the thing, or if unable, to pay the value of it to Per Dam-
nationem.

¹ I. II. 20. 1.

² Ulp. Frag. XXIV. 1.

³ See post. Chap. 8.

⁴ Gai. II. 193. 194.

BOOK
II.

the legatee¹. By this method also *res futurae*, such as the crops of a farm, or the young of animals, could be bequeathed. The remedy of the legatee, if the legacy were not paid, was an *actio in personam* against the *heres*².

Per Præceptionem.

3. *Per præceptionem* was thus: *Lucius Titius hominem Stichum præcipito*. Here a specific legacy was left to one of several heirs. He was directed by the testator *præcipere*, *præcipuum sumere*, whatever the thing might be³.

Sinendi modo.

4. *Sinendi modo* was in this form: *Heres meus damnas esto sinere Lucium Titium hominem Stichum sumere sibi que habere*. In this way the testator could not only leave his own property, but that of the *heres*; and it was sufficient if the property vested in either of them at the testator's death⁴.

Senatus-Consultum Neronianum.

The *Senatus-Consultum Neronianum* passed in the reign of Nero, A.D. 60, for amending legal flaws in these legacies⁵; and Justinian afterwards abolished all distinctions, and reduced legacies to one kind⁶.

In legacies are to be considered: 1. The things capable of being left as legacies. 2. The persons capable of receiving them. 3. The effects and incidents of legacies. 4. The ways by which they might be extinguished.

What can be left as a legacy.

I. Things corporeal or incorporeal, existing at present or in futurity, belonging to the testator, or to any other person, might be left as legacies. An instance of an incorporeal legacy would be where the testator bequeaths a debt due to himself. In such a case he gives the legatee a *right* to receive it, or to sue the debtor. We have seen that, according to Gaius⁷, the testator could bequeath the property of another; and that such legacy might be a good one. This appears singular to our ideas

¹ Gai. II. 201, and see the note.² Gai. II. 204.³ Gai. II. 216.⁴ Gai. II. 209. 210.⁵ Gai. II. 218.⁶ I. II. 20. 2.⁷ II. 204.

of the power of bequest; the law however was this: if the testator erroneously believed the property belonged to himself the legacy was bad, because it might be implied that he would not have made such a bequest had he been aware of the true state of the case; but if he did know it, then his intention was that the heir should purchase it, and deliver it to the legatee. If the purchase were not practicable, or if it could only be obtained at an exorbitant price, *pretio oneroso*, the legatee was entitled to receive the fair value of it from the heir¹.

CHAP.
VII

Legacies were classed under different heads according to the circumstances or conditions attached to them. The principal ones were: 1. *Legatum liberationis*. 2. *Nominis*. 3. *Generis*. 4. *Optionis*. 5. *Pœnæ nomine*.

*Legacies,
how class-
ed.*

(1.) *Legatum liberationis* is where the testator leaves a discharge to his debtor, and the *heres* in that case is bound to give him a receipt for that sum which would otherwise be due to the estate, and if he still demanded the debt the legatee could defend himself by the *exceptio doli mali*.

*Legatum
liberationis;*

(2.) *Legatum nominis*. This was where the testator left as a legacy a debt due to himself from a third party. As there was no privity of contract between the legatee and the debtor it was the duty of the *heres*, if necessary, to sue on behalf of the legatee; but it appears that the latter might have an *actio utilis*, an action on the case, to enforce payment².

Nominis;

(3.) *Legatum generis* was the bequest of some particular kind of thing, as a house, or a slave; in which case the *heres* was bound to give a house or a slave, but he must not select the worst, unless the power of selection be given him by the testator³.

Generis;

(4.) *Legatum optionis* is where the legatee has the right of choice, as one of my slaves⁴, in which

Optionis.

¹ Colq. 1156.

² C. vi. 37. 18.

³ D. xxx. 71. D. xxxiii. 6. 3.

⁴ D. xxx. 20.

BOOK
II.*Pænæ nomine.*

case the legatee or his heir can choose which he pleases.

(5.) *Legatum pænæ nomine* is in the case of a condition precedent to be performed by the legatee, premising of course that it be legal and possible, e.g. *Si in familiam meam nupsisset*¹. These are the principal legacies as distinguished by the mode of bequest; but several others are mentioned in the Digest².

Liability of the Heres.

If a legacy were lost or perished before the delivery without the fault of the *heres*, the loss was to the legatee, otherwise the *heres* was bound to make it good; and he was liable for *culpa levis-sima*. Also if the legacy perished by accident, after the time when the *heres* ought to have given the legatee possession, he would in such case be liable³.

Who can receive legacies. Testamenti factio.

2. All persons were capable of receiving legacies who had the *testamentifactio*, by which is to be understood not merely the power to make a will, but the capacity to receive by means of a will which many had who could not make one⁴; e.g. a *furiosus*, a *prodigus*, a *servus alienus*, or *hereditarius*.

Uncertain persons.

A legacy to a posthumous child was good, as also to an uncertain person, provided it were to one of a number of persons certain, because *id certum est quod certum reddi potest*.

An error in the proper name or surname of the legatee did not vitiate the legacy, *cum de persona constat*⁵; nor would a false description or cause if added to a legacy make it void, as *Servus Stichus quem de Titio emi*, when he had received Stichus as a gift⁶; or *Titio fundum do, quia negotia mea curavit*, when Titius had not transacted his business.

Corporations.

A legacy to a corporation, *collegium licitum*, was valid.

3. By the old law no legacies left in a testa-

¹ D. XXXV. 1. 15.² D. XXX. 47. 5. and 6.³ I. II. 20. 29.⁴ Colq. 1157.⁵ Gai. II. 189.⁶ D. XXXV. 1. 17. and par. 2.

ment were effectual unless the testator had first appointed an heir; a legacy therefore placed before the appointment of the heir was a *legatum inutile*; the *heredis institutio* being the *caput et fundamentum totius testamenti*¹: but Justinian decreed that so long as the heir was appointed the mere form of the will was of no importance².

CHAP.
VII.

Appoint-
ment of the
heir.

The *jus accrescendi* is the right of a coheir, or co-legatee, to possess the share of his companion in the estate, or legacy which he may have become incapable of possessing by death before the death of the testator, or by any legal incapacity, or even by refusal to accept it. To create the *jus accrescendi* the legacy must be left *disjunctim* or *conjunctim*; if *separatim*, the portion of one co-legatee could not vest in another, but went to the heir³. The form of a legacy left *disjunctim* was this, *Titio ædes meas do lego: Sempronio eadem ædes do lego*.

Jus Ac-
crescendi.

How cre-
ated.

The form *conjunctim* was *Titio et Sempronio ædes meas do lego*: in either case the legal effect was the same; and if, for the reasons above mentioned, the legacy did not vest in Sempronius, or he refused, the whole went to Titius; if it vested in Sempronius but for a moment it passed to his heirs⁴.

A legacy might be left *purè* (simply), or conditionally; to a certain day, or from a certain day. A legacy was left *purè* when no condition was annexed. It was a conditional legacy if the vesting of it depended on the fulfilment of the condition imposed⁵; and therefore if the legatee died before the condition was fulfilled it did not pass to his heirs.

A legacy
left purè.

Sub condi-
tione.

A legacy was left *in diem* thus: *Titio lego ædes meas per decennium*. The legacy would therefore vest in Titius from the moment of the testator's death, and he would enjoy it for ten years, calculating from that date.

In diem.

¹ Gai. II. 229.

² C. VI. 23, 24.

³ D. VII. 2. 1. and 11.

⁴ D. L. 16. 142.

⁵ D. XXXVI. 2. 5. 2.

BOOK
II.*Ex die.*

Ex die was thus: *Titio lego aedes meas post decennium a morte mea*; and Titius could not enjoy the property till the testator had been dead ten years.

*Dies cedit
ac statim
venit.*

Dies cedit ac statim venit. Dies nec cedit nec venit. These are expressions applied to legacies and contracts in the Roman law. It depended upon whether any condition were annexed, or not; if no condition, then the legacy was due immediately on the death of the testator: *dies*, the day of payment, *statim venit*, and the legacy is due forthwith. But if any condition were annexed, or it were left *ex die*, then *dies nec cedit nec venit*: till the condition had been fulfilled, or the day had arrived, the legatee could not claim possession.

*Dies nec
cedit nec
venit.*

The property in the legacy vested in the legatee immediately on the death of the testator, provided the *heres* did not refuse to act. It passed *recta via ad legatarium*¹.

A testator was not allowed to exhaust his whole patrimony in legacies, and to leave nothing for his testamentary heir. This was frequently done from the unlimited power given to the *paterfamilias* in the words of the law of the Twelve Tables. Gaius remarks that nothing was left to the *heres* but the *inane nomen*², the result of which was that the *extraneus heres*, and even the *suus heres*, sometimes by permission of the Prætor refused to act. The evil was not merely that the *heres* had not what he had a right to expect, but all the *legata* and *fideicommissa* fell to the ground; for as there was no resort to an administrator, as in the English law, the will was *destitutum*, and therefore void.

Lex Furia.

To remedy this the *Lex Furia* was passed, the date of which does not appear, by which it was declared that the testator should not leave more than 1000 asses in a legacy to any one but his

¹ D. xxxi. 80.² Gai. ii. 224.

cognate relatives: this was evaded by multiplying legacies. Then followed the *Lex Vaconia*, A.U.C. 585¹, which forbade the legatees to receive a legacy or a *mortis causa donatio* of greater amount than the sum left to the heir: in short, that the heir and legatees should share alike; but the estate was disposed of to so many persons in small legacies that it was not worth the trouble to the *heres* to undertake his duties for the small sum he got²; and in the year U.C. 714 the *Lex Falcidia*³ was passed, which forbade a testator to leave more than three fourths of his estate in legacies; and that in default of this the *heres* could take his fourth part from the *hereditas* or the legacies, clear of all deductions, which was called the Falcidian portion, and was estimated according to the value of the inheritance at the time of the testator's death, after the funeral expenses and debts were paid⁴.

CHAP.
VII.*Lex Va-*
*conia.**Lex Fal-*
cidia.

4. Legacies were extinguished: 1. By ademption, and 2. By translation. *How ex-*
tinguished.

1. Every man's *voluntas* is *ambulatoria usque ad mortem*, and the *ademptio* (the cancelling) of a legacy might be either direct or implied. The direct *ademptio* was by a verbal declaration, or positive act of the testator, as by a contrary clause in another will, or codicil, or by giving the thing away during life. Implied, as where there had been *capitales inimicitiae* between the testator and legatee, and no reconciliation had taken place⁵. *Ademptio.*
Direct and
implied.

2. By translation. This was, 1. By changing the legatee, as *Fundum, quem Titio legaveram, Maevio do lego*. *Transla-*
tion. 2. By changing the legacy itself, as *Titio pro fundo quem legaveram, mille do lego*. 3. By making a simple legacy a conditional one.

¹ Haub. II. 39.² Gai. II. 224—226.³ D. XXXV. 2. 1.⁴ Colq. 1186.⁵ D. XXXIV. 9. 9.

BOOK II. find that Augustus *ob insignem quorundam perfidiam*¹, recognised *fideicommissa* and ordered the consuls to interfere to compel the *restitutio* by the *heres fiduciarius*; and a *Prætor fideicommissarius* was appointed to enforce the claims of the *fideicommissarii*.

Definition. A *fideicommissum* is thus defined: *Quod non civilibus verbis, sed precativè relinquitur; nec ex rigore juris civilis proficiscitur, sed ex voluntate datur relinquentis*².

Liabilities of the heres fiduciarius. The *heres fiduciarius* might decline to act like the common *heres*, but if he agreed, *facere restitutionem*, to act as trustee for the *fideicommissarius*, all actions relating to the estate must be brought by and against him, because he only was the possessor in law; and thus he had all the burdens without any of the advantages. On account of the risks which the *heres fiduciarius* thus ran, it was usual for him to bind the *fideicommissarius* by a formal stipulation, *emptæ et venditæ hereditatis*, that he should indemnify him as to all legal liabilities, and also defend all actions which might be brought by those having claims on the estate. The *fideicommissarius* also, at the same time, exacted a reciprocal undertaking from the *heres*, that he would duly make over to him everything belonging to the estate³. This was a private agreement between the parties.

Scutum Trebellianum. In the year A.D. 62, in the reign of Nero, the *Scutum Trebellianum* was passed, by which it was provided, that when the *heres fiduciarius* had made the *restitutio*, or as we should say, had accepted the trust, that all rights of action, claims, and liabilities, should forthwith vest in the *fideicommissarius*⁴. There still, however, remained another inconvenience. The *lex Falcidia* did not apply to *fideicommissa*, i. e. the *heres fiduciarius* had no certain share of the estate assigned him,

¹ I. II. 23. 1.

² Gai. II. 252.

³ Ulp. Fr. XXV. 1.

⁴ Gai. II. 253.

and the consequence was that he often renounced, and the *fideicommissa* fell to the ground; therefore, in the year A.D. 70, the *Sctum Pegasianum* was passed, which extended the provisions of the *lex Falcidia* to *fideicommissa*; and the *heres fiduciarius* was allowed to deduct the fourth part of the estate as his share, if it were not given him. If the fourth part were given him, he then had to bear his portion of the expenses *pro rata* according to the Civil law; and the *fideicommissarius* his, by the provisions of the *Sctum Trebellianum*; and so there was no need of resort to the *Sctum Pegasianum*. If nothing were left to the *heres fiduciarius* he could then avail himself of the *Sctum Pegasianum*. If he once voluntarily entered upon the duties attached to his appointment, whether he retained his fourth part or not, he was liable to all the incidental expenses, unless he took care to stipulate with the *fideicommissarius* that he should bear his proportion. If perchance the *heres fiduciarius* determined to decline any advantage offered by the *Sctum Pegasianum*, and the *fideicommissarius* desired to obtain possession of the estate, the Prætor would compel the *heres* to make the *restitutio* of the whole, in which case the *Sctum Trebellianum* protected him from all suits and charges¹. Justinian afterwards united these two *senatusconsulta*, and retained the name of *Trebellianum* only².

No one could have a *fideicommissum* who could not make a will, but *fideicommissa* and *legata exæquata sunt per omnia*, and could be left by codicil as well by testament³.

Fideicommissa were, 1. Universal, or 2. Particular. The former comprised the whole, or part of the *hereditas*, the latter, only specific bequests, such as legacies. *Fideicommissa* would be left by a codicil, though not confirmed by a will⁴.

CHAP.
VIII.

Sctum Pegasianum.

Fidei commissum universal or particular.

¹ Gai. II. 255—257.

² D. XXX. 1. and 2.

³ I. II. 23. 7.

⁴ Gai. II. 270.

BOOK
II.

They were first introduced into the law of England by the monks, in order "by art and engine" to avoid the statutes of mortmain¹.

It is curious to observe how the framer of the statute of uses² has evidently copied the *senatus-consultum Trebellianum*.

¹ 15 Rich. II. 5.

² 27 Hen. VIII. c. 10.

ROMAN CIVIL LAW.

BOOK III.

OF THE RIGHTS OF THINGS.

CHAPTER I.

Of Succession by Law.

IN cases where a person has neglected, or is not permitted, to dispose of his property after his decease by testament, the law of each particular society appoints a successor whom it judges to have the best right to enter on the vacant possession; and succession by law is the title by which a man, on the death of his ancestor, dying intestate, acquires his estate, whether real or personal, by the right of representation as his next heir. He dies intestate according to the Civil law "qui aut omnino testamentum non fecit, aut non jure fecit; aut id quod fecerat ruptum irritumve factum est, aut nemo ex eo heres extitit¹." So that an intestate is one who dies without a will, which of course includes every case where a will originally valid has for any reason become void at the death of the testator.

CHAP.
I.

Intestate, who.

We will first consider the law of intestate succession as it stood before the time of Justinian, and then explain the changes introduced by that Emperor.

Before the Twelve Tables a man's children became at his death the natural occupants of his property; if he were childless, his property must have escheated unless he availed himself of the oldest will made in the *Comitia*².

Before the 12 Tables.

When the Decemviral law conceded the free right of testamentary disposition it provided also that if a citizen died intestate his property should descend in the following order:—1. To his *sui heredes*. 2. To his *agnati*. 3. To the *Gentiles*.

After the 12 Tables.

¹ I. III. 1. pr.

² See *ante*, book II. c. 6.

BOOK
III.I. *Sui heredes, who.*

I. The *sui heredes* were those children, sons and daughters, who were in the family and under the power of their father at the time of his death, and in the first degree, that is to say, a grandchild was not a *suus heres* to the grandfather so long as the father was alive. The children who had been adopted, the widow also, and the daughter-in-law, provided they were *in manu*, were *sui heredes*¹. Illegitimate children, when duly legitimated, became *sui heredes*². A posthumous child was also a *suus heres*³; and they who were prisoners of war recovered their *suitas* by the *Jus Postliminii*⁴. The *patriapotestas* was not extinct until a son had been thrice emancipated, therefore the *bis emancipati*, if manumitted after the death of their father, became *sui heredes*. Also where a marriage had taken place between a Romanus and a Peregrina, or vice versa *per errorem*;—*causa probata*, the children were reduced in *patriam potestatem*, and so became *sui heredes*; and this might be done after the death of the father⁵. Such were the *sui heredes*; and it was indifferent whether they were male or female. Sons and daughters succeeded in their own right *in capita*; grandchildren from a son only, though in ever so remote a degree, succeeded by right of representation in *stirpes*.

Succession
in capita.

In stirpes.

The succession *in capita* is where a man dies leaving, say, three sons, they each take a third of the hereditas, dividing it *viritim*: suppose two of these sons to have died before their father, the one leaving three, and the other one child: as soon as the sons are dead the grandchildren become *sui heredes*, and these will take *in stirpes* representing their deceased parents; the surviving uncle will take his third part, the one grandson will have his father's share, one-third also; and the three chil-

¹ Ulp. *Fr.* XXII. 14.² *I.* III. 1. 2.³ Gai. III. 4.⁴ *I.* III. 1. 4.⁵ Ulp. *Fr.* VII. 4. Gai. III. 5; and see *ante*, book III. c. 3.

dren will take one-third each of their father's third part. Grandchildren from a daughter could not be *sui heredes*, because they necessarily belonged to another family. CHAP. I.

Thus far the *Jus Civile* ruled the rights of the *sui heredes*, but the Prætor and the constitutions of the Emperors, admitted, from a principle of equity, those whom the law necessarily excluded. An emancipated son ceased to be a *suus heres*, but the Prætor by his Edict *unde liberi sui et emancipati* called him to the inheritance, and permitted him to share with the unemancipated children¹. This was subsequently confirmed by Justinian. Emancipated children.

Children by a daughter were first admitted to the *suitas* by a constitution of Valentinianus, Theodosius and Arcadius², which was confirmed and modified by Justinian³. The wife, as we have seen, was *sua heres*, but this depended on her being *in manu mariti*; when therefore the conventio in manum became less frequent the widow was admitted to her share of the intestate husband's estate by the Prætor's Edict *unde vir et uxor*; but to enable her to claim this, there must have been a valid marriage, and she must have been his wife at the time of his death; for if any proceedings to obtain a divorce had been commenced in the husband's lifetime which would have ended in a dissolution of the marriage, she lost her share of the property⁴. Grandchildren by a daughter.
The widow.

Since the *sui heredes* became such *ipso jure*, by the mere operation of law, *etiam ignorantes et absentes*, it follows that furiosi, prodigi and infants were classed among their number. Unde vir et uxor.

The rights of the *suitas* were lost by the *maxima* and *media capitis diminutio*, which took away the power of possessing property, also by emancipation till the Prætor gave relief by his Edict *unde liberi*. But if an emancipated son had Suitas, how lost.

¹ Gai. III. 25. 26.

² C. VI. 55. 9.

³ I. III. 1. 15.

⁴ D. XXVII. 11. 1.

BOOK
III.Unde li-
beri.2. *Agnati.*No right of
representa-
tion.

afterwards given himself in adoption he took nothing by this edict unless he were emancipated by his adoptive father in the lifetime of his natural father¹. The effect and operation of the *suitas* was such, that if the *suus heres* died before entering upon his duties, or even if he were ignorant of his ancestor's death, the estate vested in him so completely that it passed to his heir.

2. Upon the failure of the *sui heredes* the estate passed to the *Agnati*, according to the law of the Twelve Tables, which declares *Si intestato moritur cui suus heres nec escit, agnatus proximus familiam habeto*. The *agnati* are defined as those *per virilis sexus personas cognatione juncti*², whether by nature or adoption³. They were therefore the brothers, uncles and cousins of the intestate⁴. But the law did not concede the right of succession to all these alike, the nearer excluded the more remote; and there was no right of representation, so that if one brother did not survive to be heir to another, his children could claim nothing in conjunction with their surviving uncles⁵; but where there were several *agnati* in the same degree they all succeeded together *in capita*⁶, males and females alike, so that if the deceased left one brother, or sister, surviving, together with the children of other deceased brothers and sisters, that one survivor would take the whole, because there was no right of representation; but if that one survivor were dead also at the time of the decease of the intestate, then all the nephews and nieces, the children of different brothers and sisters, would share *in capita*⁷. So that in the collateral line, the right of representation was not allowed, but the nearest in degree, whether one or more, excluded all the remoter, and the succession was always *in capita*.

¹ *I.* III. 1. 10.² *I.* I. 15. 1.³ *I.* III. 2. 2.⁴ *Gai.* III. 10.⁵ *Gai.* III. 12. *I.* III. 2. 5.⁶ *I.* III. 2. 5.⁷ *Gai.* III. 15. 16.

3. When the *agnati* failed the Twelve Tables called in the *Gentiles*: *Si agnatus nec escit gentiles familiam habento*¹. And Cicero says *Gentiles sunt qui inter se eodem nomine sunt*². The gentiles were they who were descended from the same *gens*: "Gentilis dicitur et ex eodem genere ortus, et is, qui simili nomine appellatur, ut ait Cincius: gentiles mihi sunt, qui meo nomine appellantur³." The gentiles therefore were they who bore the same *nomen*, the name of the *gens* from which they came. If we take as an example Marcus Tullius Cicero; Marcus is the *prænomen*, and identifies the individual, Tullius is the *nomen* denoting the *gens*, and Cicero is the *cognomen* which points out the particular family of that *gens*. When the *familia* therefore was extinct, the law sought for the *gentiles*; and Cicero's property in such case would have gone to the Tullii.

CHAP.
I.

3. The
Gentiles,
who.

The law of the Twelve Tables did not allow inheritance to ascend, i.e. a father could not inherit from a son. Indeed this was impossible, since there could be nothing to ascend, all the possessions of the son, except his *peculium*, vesting in the father. In case however of the son's emancipation, should he die in the lifetime of his father leaving no *sui heredes*, his father was then his *legitimus heres* by virtue of the *pactum fiducia*, which took place at the time of his emancipation⁴. If this had been omitted the *paterfiduciarius* could, by the civil law, claim the inheritance, but the equity of the Prætor corrected this by the Edict *Unde decem personæ*.

No ascent
in inheri-
tance.

Unde de-
cem per-
sonæ.

By the *Scutum Tertullianum* passed in the reign of Hadrian, A.D. 158⁵, it was decreed that a *Mater ingenua* having three children, or a *Mater Libertina* having four, should inherit from their legitimate children, though she might be in the power of her father, but the children must have

Scutum Ter-
tullianum.

¹ Gai. III. 17.

² Festus sub voc.

³ Topic. c. 6.

⁴ See ante book I. ch. 5.

⁵ Haub. II. 6. 3.

BOOK
III.

died intestate, and have left no *sui heredes*, nor father nor brothers: the mother, however, was allowed to share with sisters¹. Justinian, by a subsequent constitution, allowed the mother to succeed to the property of her children without regard to the *Jus liberorum*². This *setum* allowed a mother to succeed to illegitimate children.

*Setum Orphitianum.**Illegitimate children allowed the querela.*

The *Setum Orphitianum*, which passed in the reign of Marcus Antoninus, A.D. 178³, gave children the power of succeeding to the property of the mother, and they took precedence of her *agnati*⁴. This privilege was extended to illegitimate children, because there could be no uncertainty as to the mother⁵; and on this principle they were allowed the *querela inofficiosi* if passed over by the mother⁶. The rights conferred by this *Setum*, as well as the *Tertullianum*, were not forfeited by the *capitis diminutio*⁷.

Unde Cognati.

When the *Agnati* and the *Gentiles* failed there was an end of the succession *Jure civili*. The Prætor ~~then~~ interposed his equitable Edict *Unde Cognati*, whereby he gave the succession to the *cognati*, relations, male and female, by the mother's side, among whom were comprised those *agnati* who had suffered the *minima capitis diminutio*, because *agnati sunt cognati*, and the *agnatio* only was forfeited. The right to inherit by *agnation* was allowed as far as the tenth degree, but the Prætor went no farther than the seventh in the case of *cognation*⁸. As to the degrees of the *cognati* see I. 3. 6¹⁰. Paulus expressly states that a *servilis cognatio* was not recognised by the law¹¹, but the *Libertus* being a Roman citizen possessed

¹ Ulp. Fr. xxvi. 8. I. III. 3. 3. ² I. III. 3. 4. C. VIII. 59. 1.

³ Haub. II. 65. ⁴ I. III. 4. pr. ⁵ I. III. 4. 3.

⁶ D. V. 2. 29. 1.

⁷ I. III. 4. 2.

⁸ I. III. 5. 1.

⁹ I. III. 5. 5.

¹⁰ Dr Hallifax, in his *Syllabus*, here proceeds with succession according to the Novels, but it is manifestly expedient to explain the whole of the old law before proceeding with Justinian's final arrangement.

¹¹ D. XXXVIII. 10. 10. 5.

of the *jus connubii*, his children were his *sui heredes*; but failing these where were his relations? He had none *jure sanguinis*, therefore the Twelve Tables declared, *Si Libertus intestato moritur, cui suus heres nec escit, ast patronus, patronive liberi escint, ex ea familia in eam familiam proximo pecunia ditor*¹. It appears, therefore, that if the Libertus died intestate, provided he left no children natural or adopted, and no *uxor in manu*, that then only his Patronus succeeded². This was considered unfair towards the patron, and the prætorian edict declared that the Libertus who had no children should leave half his property to his patronus; and if he omitted the patron in his will, or left him less than half, the *possessio contra tabulas* should be granted him. And if he died intestate leaving an adopted son, or an *uxor in manu*, or a daughter-in-law, the patron was also entitled to half³. Afterwards by the *Lex Papia*, which conferred the *jus trium et quatuor liberorum*, if the Libertus left fewer than three children, whether he made his will or not, the patron was entitled to his *pars virilis*, which would amount to half, or a third, of the estate, according as there might be one or two children. If three children the patron had nothing; but this supposed the Libertus to die possessed of 100,000 *sesterces*; for if his property were less than this he might dispose of it by will as he pleased, and the patron got nothing, unless he died childless and intestate; in which case the patron or his son succeeded as heir-at-law⁴. With regard to the property of the *Liberta*, inasmuch as she could have no *sui heredes*, her heir-at-law was her patron; but the *Lex Papia* emancipated her from the tutelage of her patron if she had four children, or had the *jus quatuor liberorum* conceded her by the emperor; and allowed her to dispose of her property by will, reserving a

CHAP.
I.Succession
of the Pa-
tron by the
12 Tables.Prætorian
succession
of the
Patronus.

Lex Papia.

Succession
to the pro-
perty of the
Patrona.¹ Hein. *El.* DOCVII.² Gai. III. 40.³ Gai. III. 41. I. III. 8. 1.⁴ Gai. III. 42.

BOOK *pars virilis*, according to the number of children,
III. to her patron¹.

The edict of the Prætor applied only to the patronus, therefore the Lex Papia provided that a *patrona ingenua* with two children (*liberis honorata*), or a *patrona libertina* with three, should enjoy the same rights as the edict had given to the patronus². With respect to the property of the *Liberta*, the Lex Papia gave no advantage to the *Patrona*, and so, if neither the *Patrona* nor the *Liberta* were *capite diminuta* by the law of the Twelve Tables, the property of the latter belonged to the former excluding the children, and that whether the *Patrona* were *liberis honorata* or not. When a *Liberta* died testate the *Patrona*, who had no *jus liberorum*, had no claim on the estate, but if she had the *jus liberorum*, the Lex Papia conferred on her the same rights as the *Patronus* enjoyed³.

Property
of the *Li-
berti La-
tini*.

As to the property of the *Latini*, Gaius states that the lex *Junia Norbana*⁴ expressly reserved the rights of the *Patronus* to all the possessions of the *Libertus Latinus* on his death, as though they were the mere *peculium* of the slave; and if the *Latinus* had several patrons, they shared according to the amount of interest they had in the slave before his manumission, and not equally as in the case of the *Libertus Romanus*.

Justinian's
Constitu-
tion.

Justinian, by a constitution which is now lost, reduced the above rules to a more concise form. He abolished all distinction between the patronus and the patrona, and decreed that if a freedman or woman died testate and worth less than 100 *aurei*, the patronus or patrona should take nothing. But if they died intestate leaving no children, then they should succeed to the whole, according to the old law of the Twelve Tables.

In the case of those who died worth 100 *aurei*,

¹ Ulp. Fr. XXIX. 2.

² Id. XXIX. 5. 6.

³ Gai. III. §1, 52.

⁴ A.D. 16.

if they left children as heirs the patron was to have nothing; if without children, the patronus and patrona took the whole; and if they made a will passing them over, they were then entitled to the *bonorum possessio* as far as the third part of the estate, free of all deductions; and this right of succession was extended to the collateral relatives of the patron as far as the fifth degree¹. Justinian also abolished the distinctions between the Latini and the Dedititii².

The succession of the patroni to the property of the Liberti was governed by the same rules as that of the agnati; there was no right of representation, but it was always *in capita*: a surviving patronus excluded the children of a deceased co-patronus³.

If a patron had two or more children he might assign his *jura patronatus* to which he pleased; and he might do this by will or codicil, or as a gift *inter vivos*, or *mortis causa*. This was regulated by the *Sctum Claudianum* passed in the year u.c. 798⁴. If the child to whom the assignment had been made were afterwards emancipated the assignment became void: also if a co-patronus assigned his share of the *jus patronatus* to one of his children, and died surviving the other patronus, the assignment became void, because the whole of the rights vested by law in the survivor⁵, as in the case of joint tenants by the English law. And it must be remarked, that however unequal might be the rights of the *domini* in the case of a *servus communitis*, if by manumission he received the *Libertas Romana*, they then shared equally the *jura patronatus*⁶.

CHAP.
I.

Rule of
Succession
to the pro-
perty of
Liberti.

Right of
assigning
the *jus Pa-*
tronus.

Sctum
Claudia-
num.

Shares of
co-patroni
in an
emanci-
pated slave.

¹ I. III. 8. 3.

² Gai. III. 60.

³ D. XXXVIII. 4. 12.

⁴ C. VII. 5. C. VI. 1. 12.

⁵ D. XXXVIII. 4. 1.

⁶ Gai. III. 59.

CHAPTER II.

Of the Bonorum Possessio.

BOOK
III.

*Bonorum
Possessio.*

BONORUM POSSESSIO is the right of claiming and retaining the inheritance of a person deceased not strictly due by the Civil Law, but granted by the Prætor from a principle of equity. We have already seen that where by the strict interpretation of the *Jus civile* persons were necessarily excluded from succeeding to property, to these the Prætor, in the exercise of his equitable authority, *dabat bonorum possessionem*. The *bonorum possessio* is defined as *Jus persequendi retinendique patrimonii, sive rei, quæ cujusque cum moritur fuit*¹. Gaius well explains the difference between those who thus acquired the property, and those who succeeded by law: "Quos autem Prætor vocat ad hereditatem hi heredes ipso quidem jure non fiunt, nam Prætor heredes facere non potest; per legem enim tantum, vel similem juris constitutionem heredes fiunt, veluti per senatusconsultum, et constitutionem principalem, sed eis siquidem Prætor det bonorum possessionem loco heredum constituuntur²." The *bonorum possessio* was either edictal or ordinary, and, secondly, decretal or extraordinary. In the former case the cause was not heard judicially. In the latter, where an extraordinary grant was made to particular persons by a special law or constitution, there was no decision *nisi causa cognita*, without a judicial investigation. The edictal, or ordinary, grant, which is now the subject of our inquiry, took place either when there was a testament, or when there

Definition.

*Ordinary
and extra-
ordinary.*

Ordinary.

¹ D. XXXVII. 1. 3. 2.

² Gai. III. 32.

was no testament; and this was either *contra tabulas*, or *secundum tabulas*. *Contra tabulas* was, CHAP. II.

1. Where the Prætor gave the emancipated, or adopted children, their share if passed over by the father, and who had not been duly disinherited for some just cause¹. In that case they must undertake to make the *collatio bonorum*², i.e. to bring in all their own property, which must be added to the *hereditas* before the division is made, so placing themselves in the position they would have occupied had they never left the family. The hotch-pot of the English law is exactly similar, and no doubt derived from it³. The *sui heredes*, if *præteriti*, could resort to the *querela*. *Contra tabulas or secundum tabulas.*
1. To the emancipati and adoptivi.

2. The Prætor gave the patronus his share of the estate of the libertus if passed over by him⁴. 2. To the Patroni.

3. The father in the character of quasi-patrons, if passed over by his emancipated sons, might obtain the *bonorum possessio contra tabulas*. In the above cases the Prætor set aside a will good in form, but bad in substance; but in the *bonorum possessio secundum tabulas* he amended a will, which (with one exception)⁵ having originally been good in substance had subsequently become bad. The first of these was the testamentum prætorium, where the ceremony of mancipation *per æs et libram* had been omitted, still if *septem signis testium signatum sit*, the Prætor gave the bonorum possessio to the parties named in it, provided there was no one entitled *ab intestato*⁶. Also if a testament were ruptum, nullum or irritum, the Prætor might, according to the circumstances of the case, grant the *bonorum possessio secundum tabulas*⁷. 3. To the quasi-Patroni.
Secundum tabulas.

The bonorum possessio *ab intestato*, or where the possessor died intestate, and where, if the *sui agnati* and *Gentiles* failed, according to the strict Ab Intestato.

¹ D. XXXVII. 4. 1. and 3.

² D. XXXVII. 6. 1. Ulp. Fr. XXVIII. 4.

³ See Blackstone.

⁴ D. XXXVIII. 2. 2.

⁵ Testamentum prætorium.

⁶ Gai. II. 119.

⁷ Colq. 1397.

BOOK
III.

rules of the Civil law the property would have become a *res caduca*, an escheat, possession was granted by the Prætor in the following cases:—

*Unde li-
beri.*

1. *Ex edicto unde liberi* granted to the emancipati, adoptivi, and the sui heredes; for though the last of these had their remedy by the *querela*, still they frequently resorted to the edict.

*Unde le-
gitimi.*

2. *Unde legitimi* granted to the agnati, patroni, and all who had a Civil law right of action¹. Why then should the Prætor interfere where there was a remedy at law? The parties must show that their case came within the Edict, and a decree was probably a more summary and inexpensive process.

*Unde de-
cem per-
sonæ.*

3. *Unde decem personæ*. To explain this decree, we have seen that in the emancipation of a son, if the *pactum fiduciæ* were not interposed at the third sale by the natural father², the *pater-fiduciarius*, a mere man of straw, would in strict interpretation of law have been entitled to the *jura patronatus*. The Prætor therefore preferred the following ten persons to him in case he should set up such a claim; father, mother, grandfather, grandmother, paternal and maternal; son, daughter, grandson, granddaughter, from a son or daughter, brother, and sister of the whole or half blood.

*Unde cog-
nati.*

4. *Unde cognati*. When the agnati and ~~gentiles~~ failed, the Prætor admitted the cognati who could not succeed *jure civili*; and this edict recognised illegitimate children, who succeeded reciprocally to the mother, the mother to them, and each to the other³.

*Tanquam
ex familia.*

5. *Tanquam ex familia patroni*. Here the Prætor admitted the agnati of the patronus, who had no claim on the estate of the libertus according to law.

*Patrono,
Patronæ.*

6. *Patrono, Patronæ*. This granted succes-

¹ D. XXXVIII. 7. 2. 4.

² See *ante*, book I. c. 5.

³ D. XXXVIII. 8. 2.

sion to the emancipated children as well as to the parents of the patroni, who had no claim at law. CHAP. II.

7. *Unde vir et uxor*. Where the husband or wife died, leaving no relations, the survivor succeeded. *Unde vir et uxor.*

8. *Unde cognati manumissoris*. This edict admitted the cognati as well as the agnati of the patronus. Justinian retained only four of these grants in the case of intestacy: 1. *Unde liberi*, in favour of emancipated children. *Unde cognati manumissoris.* 2. *Unde legitimi*, in favour of the agnati. *Constitution of Justinian.* 3. *Unde cognati*, to relations on the side of the mother. 4. *Unde vir et uxor*, by which the husband and wife succeeded each other when the cognati failed.

The *bonorum possessio* must be claimed within a prescribed time. In the case of parents and children an *annus utilis* was allowed, in all other cases a hundred *dies utiles*. The distinction between the *tempus utile* and the *tempus continuum* was this: in the former, the time did not begin to run till the party was aware of his right, and then the *dies nefasti* were not counted; in the latter, the time was computed from the moment the right accrued, and the *dies nefasti* were included¹. *Time of claiming.* *Tempus utile and continuum.*

As perchance they who were entitled might neglect to make their claim, or might altogether renounce their rights, the Prætor issued his *Successorium Edictum*², whereby he gave the property to the next in order who was entitled; and if ultimately no one preferred his claim, it went to the Fiscus: "Si nemo sit, ad quem bonorum possessio pertinere possit, aut sit quidem; sed jus suum omiserit, populo bona deferuntur ex lege Julia Caducaria³."

Lastly, the *bonorum possessio* was either *cum re* or *sine re*. It was *cum re* if the person to whom the grant was made were able to retain the property; for the grant of the Prætor did not prevent *Possessio cum re and sine re.*

¹ D. XXXVIII. 15. 2.

² D. XXXVIII. 9. 1.

³ Ulp. Fr. XXVIII. 7.

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III.

the possibility of some one armed with an undeniable legal title seizing the *hereditas*: e.g. a *suus heres* might appear, and then the *bonorum possessio* would be *sine re*¹. An example may be found in the case of the *testamentum prætorium*, where the *mancipatio per æs et libram* was omitted; if the will were duly sealed by seven witnesses, the Prætor "*dabat possessionem scriptis heredibus; quam bonorum possessionem cum re id est cum effectu habent si nemo alius jure heres sit*;" but if a *heres civilis* appeared the grantee could not hold the *possessio cum effectu*, and it would be *sine re*. Again, if the *heres institutus* could not be found, the Prætor would grant the *bonorum possessio* to the *substitutus*, who might afterwards be ousted by the *Institutus*, and thus his grant would be *sine re*².

Extraordi-
nary.

The extraordinary grant was by some express law or constitution.

Besides the modes of acquiring property *per universitatem*⁴ already explained, four others remain to be noticed: 1. Arrogatio. 2. Bonorum addictio libertatum servandarum causa. 3. Sectio et cessio bonorum. 4. Ex senatus consulto Claudiano.

Per arro-
gationem.

1. Arrogation and its legal consequences have been explained, Book I. Chapter 8. The person who was arrogated was *sui juris*, and passed into the *patria potestas* of the arrogator, who at the same time became possessed of all the property of the arrogatee, excepting of course whatever might be lost by the *capitis diminutio* involved in the arrogation, such as the *jus agnationis*, *usus*, and *usufructus*; but Justinian decreed that the arrogator should only acquire a usufruct in the property, the *dominium* still remaining in the person

¹ Ulp. Fr. xxviii. 13. Gai. iii. 36, 37.

² Ulp. Fr. xxiii. 6.

³ Colq. 1396.

⁴ *Universitas bonorum* as distinguished from *res singule*. *Hereditas* represents the one, *Legatum* the other. Gai. ii. 97.

arrogated¹. Also the arrogator, though not directly liable for his adopted son's debts, could be sued in his name; and if he did not satisfy the son's creditors, they might obtain possession of the son's property.

CHAP.
II.

2. *Bonorum addictio libertatum servandarum causa*. When a testator had, as was frequently the case, manumitted his slaves by a clause to that effect in his will, if the will became *destitutum* the slaves lost their liberty; and this often occurred when the *heres* found the estate was insolvent. The emperor Marcus on that account issued a constitution², by which it was provided that in case the heir refused to act, the property of the deceased should be delivered over to one or more of the slaves mentioned in the will, whereby they obtained their liberty on undertaking to pay the creditors in full. Justinian decreed, 1. That the *addictio bonorum* should take place only once in the year. 2. That if several persons demanded the *addictio* and offered security, it should be granted to them jointly. 3. That he should be preferred who offered the largest security. 4. That he who promised to pay a larger dividend within the year than he to whom the property had been addicted should have it transferred to him, the other obtaining his liberty³.

*Bonorum
Addictio.*

*Justinian's
decrees.*

3. The effects of debtors in case of insolvency were assigned by the Prætor to some one in order to be sold, and divided among the creditors; which was the mode of acquiring property *per sectionem bonorum*. This was in fact the Roman bankruptcy, and is as old as the Twelve Tables. The debtor was allowed thirty days to arrange his affairs; if at the end of that time he neither paid, nor gave security for the payment of what he owed, he was handed over to his creditor, who might keep him for sixty days confined in *privato carcere*; and if

*Sectio bo-
norum.*

¹ I. III. 10. 2.

² C. VII. 3. 15.

³ Hein. Ant. III. 13. 4.

BOOK III. at the end of this period his debts were not paid, *fiat sectio*, his goods were publicly sold, and a dividend was made of his estate and effects rateably among his creditors¹. It is out of place here to discuss the disputed question of cutting up the body of the debtor. In the absence of all evidence to the contrary, and following the dictates of common sense, we may conclude that the *sectio* applied to the *corpus bonorum*, and not the *corpus debitoris*.

Cessio bonorum.

Cessio bonorum did not exist till the time of Julius Cæsar, when it was introduced by one of the *leges Julæ*. This corresponded with the English "relief of insolvent debtors." The debtor was relieved from the annoyance of his creditors if he honestly surrendered his property for the liquidation of his debts; but, as in the English law, his future property remained liable².

Sctum Claudianum.

4. Lastly, the *Sctum Claudianum*, which Justinian calls the "*miserabilis per universitatem acquisitio*," decreed that if a free woman continued to cohabit with a slave after three warnings, she should become the slave of her paramour's master, and all her property should be forfeited to him³. This Justinian abolished.

¹ Id. III. 3. 4.

² C. VII. 71. 1. and 4. D. XLII. 3. 7.

³ Gai. I. 160.

CHAPTER III.

Of Succession by Law according to the Novels.

THE law of succession to the property of those who died intestate, from the time of the Twelve Tables to that of Justinian, has been explained, and it consists of the provisions of the Decemviral law gradually extended and enlarged by the equitable edicts of the Prætor; four of which Justinian retained, viz. *unde liberi*, *unde legitimi*, *unde cognati*, and *unde vir et uxor*; and these are acknowledged as law in the Institutes, Digest and Code. CHAP.
III.

This union of legal and edictal rights, the latter the necessary consequence of the deficiency of the former, was at best but a patchwork affair; and therefore Justinian, before the close of his reign, remodelled and simplified the law of intestate succession. This he did by the 118th Novel, which was published on the seventh day before the kalends of August, in the eighteenth year of his reign, A.D. 543¹. By this constitution all distinctions between the *sui* and *emancipati*, and between the *agnati* and *cognati* were abolished, and the succession was reduced to the simple division of 1. Descendants. 2. Ascendants. 3. Collaterals. Novel 118,
and its
provisions.

1. Descendants, i.e. the children and grandchildren of the intestate, succeed, the former *in capita*, the latter *in stirpes*, dividing the property equally among them. These are *legitimi*, or *legitimati*, *adoptivi*, and *illegitimi*, without regard to sex. Sons and daughters succeed *in capita*, i.e. sharing the property equally among them; if any of them have died before the father or grandfather, Succession
of descend-
ants.

In capita
and per
stirpes.

¹ Nov. 118, ad finem.

BOOK
III.

leaving issue, their children take along with their uncles and aunts *per stirpes*, i.e. they take their parents' share, dividing by the number of themselves: thus

<p><i>A</i> dies intestate leaving three sons</p>	{	<p><i>B</i> dead before <i>A</i> leaving x <i>C</i> leaving y <i>D</i> surviving. z</p>
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*Legitimati
and adop-
tivi.*

Then *B*, *C* and *D* would take each a third of the estate *in capita*, whether they had been emancipated or not; but as *B* and *C* have died before *A*, their children, the grandchildren of *A*, take their respective parents' shares *per stirpes*, by the right of representation; x , y and z will therefore each have a third of their parents' portion, and c will take the whole share of *C*. Illegitimate children duly legitimated shared with those born legitimate, but they must be *plene legitimated*; and adopted children also, provided the *adoptio* were *plena*¹.

Thus descendants, of whatever degree, male or female, excluded all other relations, whether ascendants or collaterals; and in the order of descendants no regard was had to primogeniture; and no preference in respect to sex².

2. *Ascend-
ants.*

Secondly, if there be no descendant—for if there be one, he or she excludes every one else—then the succession devolves upon the ascendants; and here, as there is no right of representation, the nearer excludes the more remote.

*Right of
succession
between as-
cendants and de-
scendants
reciprocal.*

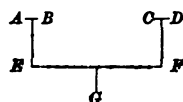
If there be ascendants in the same degree, they share equally; and it must be observed, that the right of succession between ascendants and descendants is reciprocal, and therefore where the natural son cannot succeed to his father, neither can he succeed to his uncle by the father's side; but as he could succeed to his mother by the *scutum orphitanum*, therefore he could succeed his maternal uncle³.

¹ Colq. 1432—3.

² Nov. 118. c. 1.

³ Colq. 1437.

2. (1.) Ascendants alone.



CHAP.
III.

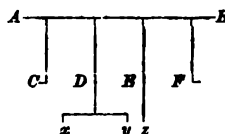
Ascendants
alone.

Let *G* be the person deceased intestate, leaving *E* and *F*, his father and mother, also *A* and *B*, and *C* and *D*, his paternal and maternal grandparents respectively, surviving. Then *E* and *F*, his father and mother, would first take the property equally, the nearer in degree excluding the more remote; and if one of his parents only survived, that one would take the whole. Next, suppose the parents be dead, the grandparents surviving them, then one moiety of *G*'s property goes to *A* and *B*, the other to *C* and *D*; and if *A* the paternal grandfather be dead, *B* the paternal grandmother will take one moiety, the other being shared by *C* and *D* the maternal grandparents; and this is what the civilians mean by the succession being *in lineas*, half going to one side, and half to the other.

Succession
in lineas.

(2.) Ascendants together with brothers and sisters.

Let *C* be the deceased, leaving *A* and *B*, father and mother; *D*, *E* and *F*, three brothers, or brothers and sisters. Then the estate is divided into five parts, each taking *in capita*.



Ascendants
with bro-
thers and
sisters.

(3.) Ascendants together with brothers and sisters, and brothers' and sisters' children.

Let *C* be the deceased, leaving *A* and *B*, father and mother, and *F* a brother or sister surviving. *D* and *E*, two brothers, have died before him; the one leaving two children, *x* and *y*, and the other one child, *z*. The estate, as before, will be divided into five parts. *A*, *B* and *F* will each take a fifth *in capita*; *x* and *y*, the children of *D* deceased, will take their parents' fifth divided by 2, and *z*, the only child of *E*, his parents' whole share *per stirpes*¹.

Ascendants
with bro-
thers and
sisters, and
their chil-
dren.

¹ Nov. 118, c. 2.

BOOK
III.

Ascendants
with bro-
thers' and
sisters'
children
alone.

(4.) Ascendants together with brothers' and sisters' children alone. If on the death of *C* all his brothers and sisters be dead, *A* and *B*, his father and mother, surviving, together with *x* and *y* the two children of *D*, and *z* the child of *E*, then the estate will be divided into four parts: *A* and *B* will take each a fourth *in capita*; *x* and *y* will share another fourth part, representing their deceased father *D*; and *z* will take the remaining fourth part, representing his parent *E in stirpes*.

Brothers
and sisters
with bro-
thers' and
sisters'
children.

3. Collaterals. (5.) Brothers and sisters, with brothers' and sisters' children. Here on the death of *C* his estate will be divided into three parts: *F*, his surviving brother, will take one third *in capita*; *x* and *y*, the children of *D* deceased, will share another third, and *z*, the child of *E*, will take the remaining third *in stirpes*, representing their deceased parents.

Brothers'
and sisters'
children
alone.

(6.) Brothers' and sisters' children alone. Suppose at the death of *C* he leaves no brothers or sisters surviving, but only his nephews *x*, *y* and *z*, they will then succeed *in capita*, each taking a third of the inheritance. The rule is, that *fratrum et sororum liberi quando soli sunt*, i.e. have no uncles or aunts to concur with them, succedunt *in capita*. The reason of this is, that they do not in that case take by *representation*, but in their own right, being all *ejusdem gradus*¹.

Thus far brothers and sisters of the half blood are entirely excluded by the whole blood, and consequently their children can have no right of representation.

Brothers
and sisters
of the half-
blood, and
their chil-
dren.

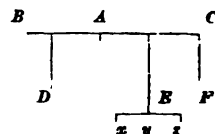
(7.) Brothers and sisters of the half-blood, and their children.

If *A* be the father, *B* and *C* his two wives, then *D* and *E* are half brothers, *consanguinei*.

Consanguinei
and
uterini.

If *A* be the mother, *B* and *C*

her two husbands, then *D* and *E* are half brothers



¹ D. XXXVIII. 16. 2. 2.

uterini. On the death of *D* leaving his half brothers, *E* and *F*, surviving, they each take half of his estate in *capita*. If *E* be dead, *F* takes half as before, and *x*, *y* and *z*, the children of *E*, will take the other half divided by three¹. If the deceased leave no brothers, or brother's children, then all other collaterals succeed according to their respective degrees, preferring the nearer to the more remote².

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III.

¹ Nov. 118. c. 3.

² Colq. 1427. et seq. The reader will find a translation of Nov. 118, with notes, in the edition of the *Institutes* by Dr Harris.

CHAPTER IV.

Of Obligations in general.

BOOK
III.

Obligation. AN Obligation is a bond of law or equity, and sometimes of both, by which a person is laid under a necessity to give or to do something: it is thus defined by Justinian.

Definition. *Obligatio est juris vinculum quo necessitate astringimur alicujus rei solvendæ secundum nostræ civitatis jura*¹. It has already been observed² that right and obligation are reciprocal; the obligation on one side involves the *Jus ad rem*, on the other, whereby the creditor can sue the debtor. Obligations are threefold: 1. Natural. 2. Civil. 3. Mixed.

Natural. A natural obligation is that which is not recognized by the Civil Law. *Quibus natura debeatur, ii non sunt loco creditorum*³, and therefore such have a remedy only in equity. Natural obligations are perfect, and imperfect. A perfect natural obligation is that whereof the performance may be compelled in equity. *At Prætor pacta conventa, quæ neque dolo malo neque adversus leges facta sunt, servabo*⁴. All such therefore were perfect natural obligations, the performance of which could be compelled by application to the Prætor. A natural obligation, strictly speaking, is only another term for a moral obligation, which has no *legal* validity until it be recognized by the civil law; the transactions therefore which did not come within the recognized contracts of the Roman law, to which specific actions were assigned for enforcing

¹ I. III. 14. pr.

² D. L. 16. 10.

³ Book 1. ch. 2.

⁴ D. II. 14. 7. 7.

redress to those who were injured, soon received the support of the Prætor through his equitable jurisdiction, provided they were not tainted with *dolus malus*, and were not *pacta conventa adversus leges*; but it is difficult to mark the exact confines between a perfect natural obligation which might be enforced only in equity, and that to which the *jus civile* assigns a remedy by an *actio in factum*, or *præscriptis verbis*. The Prætor's authority was more frequently exerted in affording a valid defence to those who were sued upon a *nudum pactum*, than in enforcing a natural obligation. We may assume that all innominate contracts were originally enforced by the Prætor before the legal remedy by the *actio in factum*, or *præscriptis verbis*, was established; and whenever any obligations arose which were not within the verge of the law, the Prætor enforced them on the grounds of equity, if they came within the verge of his *album*¹. The case of *pecunia constituta* will afford an ex- *Perfect. pecunia constituta* ample. This was where the debtor covenanted to pay money due, but without writing, or the solemn form of stipulation, and therefore it did not come within any recognized contract; but the Prætor enforced it *naturali ratione, quoniam grave est fidem fallere*: and Ulpian adds, *et mulieres de constituta tenentur si non intercesserint*². Here *Imperfect.* the Prætor's hands were tied, because women were forbidden by the *Scutum Velleianum*³ to become sureties; and they and their *heredes* could claim an *exceptio* whereby, if they were sued on such an undertaking, the plaintiff would be nonsuited, *sum-motus*. A civil obligation is that which is recog- *Civil.* nized and enforced by the civil law. A mixed *Mixed.* obligation was that in which the parties were bound both in law and equity, as in all innominate contracts, where a remedy might be had by the *actio præscriptis verbis*, or by the edict of the Prætor. Obligations might arise from a lawful, or an unlawful

¹ D. II. 14. 1.² D. XIII. 5. 1.³ D. XVI. 6. 1. 2.

- BOOK III. act: the former were called *contractus*, the latter *delicta*. When the agreement in a contract was not expressed, but presumed, it was called *quasi contractus*; and when an unlawful act was committed through negligence, and not ill design, it was called *quasi delictum*¹. Obligations therefore are classed under four heads: 1. *Ex contractu*. 2. *Quasi ex contractu*. 3. *Ex delicto*. 4. *Quasi ex delicto*.
- How created. Definition of a Contract. A contract is an agreement, upon sufficient consideration, to do, or not to do, a particular thing; with an obligation, at least on one side, and an action to enforce the performance. *Contractus sunt conventiones quæ habent nomen et causam præsentem sua natura civiliter obligantem*².
- Four kinds. Conventio. *Conventio, vel pactio, est duorum pluriumve in idem placitum consensus*³.
- Pacta. Pacts and contracts, says Dr Hallifax, were different from each other; but there is no essential difference between them; a pact is a contract, but the Roman Jurists called those agreements pacts to which no civil action *eo nomine* was attached, and contracts those to which a special action was assigned to enforce the performance. A pact, unless it were a *nudum pactum*, could be enforced either in law or equity.
- Nudum. Pacts were, 1. *Nuda*. 2. *Legitima*. 3. *Adjecta*. *Nudum pactum* was that which was *sine causa*, without any consideration, and therefore no action would lie; hence the universal maxim *ex nudo pacto non oritur actio*. *Dabo ut des* was a *nudum pactum*; but *do ut des*, if accompanied by the absolute delivery and acceptance of the thing, was a pact which could be enforced; the *causa præsens* immediately arose *civiliter obligans*, and the donee would be obliged to perform his part by an action *bonæ fidei*.
- Legitimum. *Pactum legitimum* was that which the law enforced, although, on the face of it, it was a *nudum*

¹ See *post* ch.² *D. II. 14. 7. 1.*³ *D. II. 14. 2.*

pactum. Several instances might be given, one will serve as an example: the *mere* promise to pay the *dos*, though unaccompanied by any writing or stipulation, could be enforced, marriage being a sufficient consideration¹.

CHAP.
IV.

Pactum adjectum was a collateral pact attached to some contract, and so in fact formed a part of the contract in question; as in the case of the emancipation of the *filius familias*, the father at the third sale added the *pactum fiduciæ*, which was thus said to be *adjectum*². *Pactum Prætorium* has already been explained as that which the Prætor enforces on the ground of equity.

Adjectum.

Prætorium.

Contracts were either *stricti juris*, or *bonæ fidei*. In the contract *stricti juris* the plaintiff had judgment for so much, and no more, than he was entitled to by the express words of the contract. For example, if the plaintiff brought his action to recover *centum aurei*, which he alleged were due on a stipulation, he was strictly confined to his proof, and he had *centum aurei*, or nothing; but in the contract *bonæ fidei* he had judgment for that which was not *expressly* agreed upon, provided it was incident and common to the contracts of the description in question, e.g. buying and selling, and letting and hiring, and many others in which full power was given to the judge to determine according to the rules of justice and equity how much the plaintiff was entitled to recover, because in contracts of this kind an adjustment of the respective claims of the parties was allowed.

*Bonæ fidei
and stricti
juris.*

In estimating the damage occasioned by either of the parties to a contract it was considered whether such damage was owing to *dolus*, or *culpa*, or *casus fortuitus*. *Damnum*, or damage, is the loss which is occasioned to one of two contracting parties by the fault of the other; and might arise by design, by negligence, or by accident.

Damnum.

Under the head of *dolus*, or design, is included

¹ C. v. 11. 6.

² See *ante* book I. ch. 5.

BOOK III.	every thing which comes within the verge of fraud: it is <i>omnis calliditas, fallacia, machinatio ad circumveniens, fallendum, decipiendum alterum adhibita</i> ¹ . Every one is liable for <i>dolus</i> without exception; and in interpreting <i>dolus</i> the intent must be regarded.
<i>Dolus.</i>	
<i>Culpa.</i>	<i>Culpa</i> , or negligence, is <i>omne factum inconsultum</i> , every inconsiderate act, which includes acts of omission as well as commission whereby another is injured; and Paulus defines it as <i>quod cum a diligente provideri poterit non est provisum</i> ² . The Roman Jurists arranged <i>culpa</i> under three heads: <i>lata</i> , <i>levis</i> , and <i>levissima</i> , representing the liabilities of persons according to the circumstances of each particular case.
<i>Lata.</i>	<i>Lata culpa</i> was said to be committed by those who neglected to use such diligence and care as all persons, <i>etiam dissoluti</i> , of common sense, however inattentive, are accustomed to show in the management of their affairs.
<i>Levis.</i>	<i>Levis culpa</i> was the omission of such care and diligence as every man of common
<i>Levissima.</i>	prudence takes of his own concerns. <i>Levissima culpa</i> was the neglect of that diligence which <i>paterfamilias attentissimi</i> only were guilty of. It was an
Liability of parties.	admitted principle that <i>secundum utilitatem contrahentium dolus et culpa est præstanda</i> ; and therefore where the advantage was all on one side, as in the contract of <i>depositum</i> ³ , the <i>depositarius</i> was only liable for <i>dolus</i> . Where the advantage was mutual, as in the case of <i>locatio et conductio</i> , the conductor, a carrier for instance, was liable for <i>culpa levis</i> . If the benefit were entirely on the side of the receiver he would be liable for <i>culpa levissima</i> , as in the case of <i>commodatum</i> ⁴ .
<i>Casus.</i>	<i>Casus fortuitus</i> , or accident, is defined as <i>eventus cui resisti non potest</i> , and included not only the <i>actus Dei</i> , but <i>latronum hostiumve incursus</i> ⁵ ; also <i>rapinæ, tumultus, incendia, aquarum magnitudines</i> , for which no one was liable ⁶ . A person

¹ D. IV. 3. 1. 2.² D. IX. 2. 31.³ See post ch. 5.⁴ D. XIII. 6. 5. 2.⁵ D. XIII. 6. 18.⁶ D. L. 17. 23.

however might be liable for *casus fortuitus* if he were *in mora*, i.e. if he neglected to fulfil his contract within a time specified, and damage afterwards accrued by *casus*. Take as an example the case of a *commodatum*: if the *commodatarius* neglected to return the *res commodata* at the time agreed on, and it were accidentally destroyed by fire, or were stolen, it would be in vain to plead *casus*, he must make good the loss; but still the rule that no one is liable for *casus* holds good, for in fact his liability arises from his *culpa*, and not from the *casus*.

CHAP.
IV.

Mora.

Contracts were either nominate or innominate. Nominate contracts were those which had *nomen et causam simul*, both a name and a consideration, and a cognate action for damages. Innominate had *causam sine nomine*. *Do ut des*, *Do ut facias*, are examples of innominate contracts, of which there might be a great variety; they had no cognate actions, but the remedy was by an *actio in factum*, or *præscriptis verbis*¹; and no money could have a place in them, or they immediately resolved themselves into the nominate contracts of buying and selling, or letting or hiring. Blackstone and some of his subsequent editors have erred on this point².

*Nominate
and Inno-
minate.*

Nominate contracts were of four kinds, expressive of the ways in which they were formed: 1. Real; 2. Verbal; 3. Literal; 4. Consensual. Contracts were *unilateral*, or *bilateral*. The former were those where one party only was bound *ali-quod præstare*, no liability resting upon the other: of this kind were *mutuum*, a loan; *stipulatio*, a solemn verbal promise; and all the *contractus innominati*.

The *bilateralis contractus* is where the two parties are equally bound by the contract *pro* and *con*.

¹ D. XIX. 5. 2 and 3.

² Title by Contract.

CHAPTER V.

Of Real Contracts.

BOOK III.

*Real Con-
tracts,
what.*

REAL Contracts are those in which, besides the consent of the parties, the delivery of some thing was required to perfect the obligation. These were four in number: 1. *Mutuum*. 2. *Commodatum*. 3. *Depositum*. 4. *Pignus*. To which may be added, 5. *Precarium*. Those innominate contracts in which it was agreed that some thing should be given as soon as the *traditio* of the thing was performed, became also real contracts, such as *Do ut des*; *Do ut facias*.

*Mutuum.
Definition.*

1. *Mutuum* is a gratuitous loan of money, *pecunia numerata*, or of consumable goods—corn, wine, oil, &c., called *res fungibiles, quas pondere numero et mensura consistunt*¹. It is so called because *quod ita tibi a me datum est, ex meo tuum fit*². On the delivery of the *res mutuata* the property (*dominium*) was transferred to the receiver, who, as he could not return the identical thing from its nature, was bound to return the like *pondere, numero, aut mensura*. No one could give a *mutuum* unless he could alienate; and if any one should have granted a *mutuum* who had no right to alienate the property, it might be recovered by the *actio vindicationis* if unconsumed, otherwise by the *actio condictiois*³.

*Who could
grant.*

*Indebiti
solutio.*

In the case of *indebiti solutio*, i.e. where a party in paying a debt by mistake pays more than is due, the receiver stands in the position of one who owed a *mutuum*, and the money so over paid could

¹ D. XII. 1. 2. 1.

² Gai. III. 90.

³ D. XII. 1. 11. 2.

be recovered as a *quasi mutuum* by the *actio condictitia*¹. CHAP.
V.

Although the *dominium* of the thing lent passed to the receiver, yet neither the *quantitas* nor the *qualitas* was alienated, consequently this must be scrupulously restored². The borrower could not return new wine for old; it must be of the same quality and goodness. Less might be returned than was received if agreed upon; but not more, as that would destroy the character of the contract³.

In this contract the receiver is liable for *casus*, because the *dominium* passes to the borrower, and therefore if the *res mutuata* were accidentally lost or destroyed it must nevertheless be returned⁴. This was an unilateral contract, and the *actio mutui* lay for the lender against the borrower and his *heredes*. As regards a *mutuum* of money it must be gratuitous, otherwise it immediately becomes *fenus*. The difference between *mutuum* and *fenus* *Fenus.* was a wide one; the former was gratuitous, the latter was a lending on interest. *Fenus* was lent for the purpose of profit, *mutuum* from motives of friendship; *fenus* must be repaid at a fixed day, *mutuum* was returned at the convenience of the borrower; *fenus* was recovered by the *actio kalendarii*, *mutuum* by the *actio certi ex mutuo*.

The ignorance of the Romans as to the true principles of commerce is strikingly exhibited in their laws respecting *usura*, or interest for money. They made no distinction between usury in its modern signification, and a fair and reasonable interest for the loan of money. Various laws were passed to regulate the rate of interest; and one, the *Lex Genucia*, to prohibit the taking interest *Lex Genu-
cia.* altogether. This was evaded in numerous ways, and ultimately the highest legal rate of interest was fixed at 12 per cent. per annum, viz. one per cent.

¹ I. III. 15. 1.

² D. XII. 1. 11. 3.

³ D. XLI. 1. 11. 1.

⁴ D. LXIV. 7. 1. 4.

BOOK III. per month. The *Fœneratores* or *Argentarii*, the money-lenders, met in the temple of Janus on the first of the month to receive their interest. The following is a table of the different rates of interest from 12 to 1 per cent. per annum. As represented the highest legal interest of 12 per cent per annum.

Assis usuræ, called also *centessimæ usuræ*, was 1 per cent. per month, or 12 per cent. per annum.

Deunces usuræ was 11 per cent. per annum.

<i>Dextantes</i>	... 10	...	...	...
<i>Dodrantes</i>	... 9	...	...	...
<i>Besses</i>	... 8	...	...	...
<i>Septunces</i>	... 7	...	...	...
<i>Semisses</i>	... 6	...	...	...
<i>Quincunces</i>	... 5	...	...	...
<i>Trientes</i>	... 4	...	...	...
<i>Quadrantes</i>	... 3	...	...	...
<i>Sextantes</i>	... 2	...	...	...
<i>Unciæ</i> ¹	... 1	...	...	...

The party who had been induced to pay more than 12 per cent. per annum had the lender at his mercy, for in repaying the capital borrowed, *sors*, he might deduct the excess from it; and if the whole of the *sors* advanced had been swallowed up the excess might be recovered as *sors indebita soluta* by the *condictio indebiti*². The account book in which the debt of the borrower was entered was called *kalendarium*³, hence the *actio kalendarii*.

*Nauticum
Fœnus.*

The *nauticum fœnus* was an exception to the above. When money was sent by sea, and the risk lay with the creditor while the ship was on the voyage, he was therefore allowed to take *infinitæ usuræ*, but this ceased as soon as it came into port⁴. Justinian made the following alterations⁵. He fixed the *nauticum fœnus* at 12 per cent., and reduced ordinary interest to 6 per cent., allowing 8 per cent. as mercantile interest.

*Commoda-
tum.*

2. *Commodatum* is a loan of inconsumable goods lent gratuitously for a certain use, or for a

¹ Hein. *Ant.* III. 15. 19 et seq.; Colq. 1543.

² Paul. R. S. II. 14. 2.

³ D. XXXII. 41. 6.

⁴ D. XXII. 2. 1. and 3.

⁵ C. IV. 32. 26. 1.

specified time, on condition of having the same returned in specie. *Commodatum est contractus quo res non fungibilis gratis utenda ita traditur ut finito eo usu res eadem restituatur*¹. CHAP. V.
Definition.

The *dominium* is not transferred as in a *mutuum*, but remains in the lender. No money, nor any thing by way of recompense, can be given for the use of the thing lent; it would otherwise become the contract of hiring, or the innominate contract of *do ut des*. The *res commodata* could not be recalled until the use, or the time for which it was granted was complete, otherwise it was a *precarium*; nor could the borrower use it in any other way than that agreed on, or he was guilty of theft². As a general rule the *commodatarius* was liable for *culpa levissima*³, for he was bound *ad diligentiam*: but this was where the benefit was solely on his side. In this case however the *commodans* might be liable for damages to the *commodatarius* if he were guilty of *culpa lata*; such as knowingly lending him a kicking horse, or a musty cask. If the convenience of the *commodans* and the *commodatarius* were equally concerned, they were reciprocally liable for *culpa levis*⁴; but if the lending concerned the convenience of the lender only, the *commodatarius* was only liable for *dolus*⁵. Ulpian gives an instance where the bridegroom lent, e.g. garments to his *sponsa*, *quo honestius ad se deduceretur*. If the thing lent perished by accident the loss was borne by the lender; but here the question would arise as to whether there might not be some fault in the *commodatarius*, which might make him liable notwithstanding. One asked his friend to lend him his plate for a supper-party in Rome; instead of this he took it with him into the country, and was robbed on the way. The plea of *casus* would not avail him, and he must restore the

Liability of
Commoda-
tarius,

and of
Commo-
dans.

¹ Hein. *El.* 797.

² *D.* XLVII. 2; *D.* LIV. 1; and see post, definition of *furtum*.

³ *D.* XIII. 6. 5. 2.

⁴ *Id.*

⁵ *D.* XIII. 6. 5. 10.

BOOK
III.Actio Com-
modati di-
recta et
contraria.

value¹. The actions on this contract are *directa* and *contraria*. The *actio directa* lay for the *commodans* against the *commodatarius*, and his representatives, for the restoration of the thing lent, and for any damages which might have arisen by *culpa levissima*.

The *actio contraria* lay for the *commodatarius* against the *commodans*, and his representatives, for any loss or damage occasioned by the trouble and expense of recapturing a runaway slave; or the loss of wine or oil from musty or leaky casks which the *commodans sciens commodavit*².

Depositum.

3. *Depositum est contractus re initus quo quis alteri rem mobilem ita gratis custodiendam tradit ut quandocunque deponenti placuerit eandem in specie restituat*³: the delivery of some chattel to another for the purpose of safe custody, the possession to be resumed at the pleasure of the owner.

† This is a gratuitous contract. If money were introduced into the agreement it would immediately become *locatio et conductio*. It transfers possession and custody, but neither *usus* nor *dominium*; and if the *depositarius* were to use the thing he would be guilty of theft. The advantage here is all on the side of the *deponens*, who was therefore liable for *culpa levissima*; such as placing a glandered horse in the stable, or scabby sheep in the paddock of his friend. The *depositarius* was liable for *dolus* only⁴.

Liability of
Deponens
and Depo-
sitarius.Simplex
and Misc-
rabile.Seques-
trum.

A depositum was twofold: 1. *Simplex*. 2. *Miserabile*. The former was the ordinary case of one who placed his property with his friend for safe custody; the latter, where on the occasion of a fire, or a shipwreck, property was deposited with another from necessity to secure it from destruction. *Sequestrium*⁵ differed from *depositum*; it was generally where property about which there was a

¹ D. XIII. 6. 18.² D. XIII. 6. 18. 2. and 3.³ D. XVI. 3. 4; Hein. *El.* 806.⁴ D. L. 17. 23.⁵ D. L. 16. 110.

dispute, was placed in the custody of a third party to hold until the suit was decided. It was frequently ordered by the Prætor, and applied to *res immobiles* as well as to chattels. In a *depositum* the possession remains in the *deponens*, but in a *sequester*, the object being to prevent the possession of either contending party, the possession and the care was vested in the *sequester*. In this contract the *actio depositi* lies *directa et contraria*; the former on behalf of the *deponens* against the *depositarius* and his *heredes* to compel the return of the thing deposited *in specie*, and for damages to repair any loss occasioned by the *dolus* of the *depositarius*¹, who has no right to detain it as a *lien* for expenses; the latter against the *deponens* and his *heredes* for any loss the *depositum* may have occasioned, or necessary expenses attending the *custodia*. As to the liabilities of the *depositarius*, in an ordinary case they are *nil*, if he observe the same care as he exercises with regard to his own property, and return the *depositum* when demanded; but the circumstances attending it could be so various that he might be liable for *culpa levis*, and even for *casus* if he do not return the thing on demand, and the accident happen afterwards. The reader is advised to consult the treatise of Professor Story on Bailments, where much interesting matter will be found².

CHAP.
V.*Actio depositi directa et contraria.**Liability of the Depositarius.*

4. *Pignus est contractus re initus, quo creditori res ita traditur in securitatem crediti, ut soluto debito eadem in specie reddatur*³.

Pignus. Definition.

Pignus is the delivery of a thing to a creditor as a security for money due, on condition of returning it to the owner after payment of the debt.

Hypotheca was a pledge, not delivered to the creditor, but continued in the possession of the

Hypotheca.

¹ The authorities are not consistent on this head: *dolum tantum in depositum*, says D. L. 17. 23. But other passages make him liable for *culpa lata*.

² Commentaries on the Law of Bailments.

³ Hein. El. 819.

BOOK
III.

*Pactum
antichre-
seos.*

*Liabilities
of pawnor
and
pawnee.*

*Actions
directa and
contraria.*

debtor, and usually applied to *res immobiles*; and it was effected by a *pactum conventum* between the parties to the effect that *res ejus propter aliquam obligationem sint hypothecæ nomine obligatæ*¹. Every thing could be given as a *pignus* which could be a security to the creditor, who was entitled to possession and safe custody, but he could not use the thing unless the *pactum antichreseos* formed part of the agreement, by which the creditor was allowed to take the *fructus* of the *pignus* by way of interest, or to use it in lieu of interest². This resembled the *vivum vadium* of the English law; for if the creditor received as much from the *fructus* as would pay the debt, he was obliged forthwith to return the *pignus*; and if he received more, an action would lie for the debtor to recover the difference³. The creditor might sell the *pignus* according to the circumstances of the contract. If the money were to be paid at a certain day, and there was no agreement to the contrary, the money not being paid the creditor might sell the *pignus* without giving any notice to the debtor; but if he disposed of it before payment was due, he was guilty of *furtum*⁴. When the debt was not payable at any fixed time, if the creditor wished to sell the *pignus*, he must give the debtor three notices⁵. Justinian required one notice, after which two years were allowed to the debtor to redeem his property⁶. In this contract the parties were reciprocally liable for *culpa levis*⁷, since the convenience of both was equally concerned. The *actio directa* lay for the debtor, who having paid his debt had a right to recover the *pignus*, and compensation for any damage done to his property whilst in the hands of the creditor. The *actio contraria* lay for the creditor against the debtor and his *heredes* to recover any necessary charges

¹ D. XX. 1. 4.² D. XX. 1. 11. 1.³ C. IV. 24. 1.⁴ D. XLVII. 2. 73.⁵ Paul. R. S. II. 5. 1.⁶ C. VIII. 34. 3. 3.⁷ D. XIII. 6. 5. 2; C. IV. 24. 5. 7.

he had been at in the proper keeping of the *pignus*, or if it had been claimed as the property of another person¹. CHAP.
V.

5. *Precarium* is defined by Ulpian as *quod precibus petenti utendum conceditur, tam diu quam diu is qui concessit patitur*. This contract is not unlike *commodatum*; but there is a wide distinction legally, as the thing is granted for no specific time or use, and may be revoked at the pleasure of him who grants it. The property remains in the lender, and the borrower is only liable for *dolus*; because, as the lender may revoke it at any moment, he should do so if he have reason to fear his property will not be duly taken care of². *Precarium.*
Definition.

Liability of
receiver.

¹ D. XIII. 7. 8; *Id.* XXXVI. 1.

² D. XLIII. 26. 8. 3.

CHAPTER VI.

Of Verbal Contracts.

BOOK
III.

VERBAL Contracts were those in which, besides the consent of the parties, a solemn form of words was required to perfect the obligation. This was done by a stipulation, which consisted of a question and answer passing between the parties according to the form prescribed by law.

Stipulatio.
Definition.

*Stipulatio est contractus unilateralis, quo quis ad alterius interrogationem congrue et incontinenti respondendo ad dandum aliquid vel faciendum quod alterius interest obligatur*¹. The question being framed upon the preceding agreement, the reply must be *congrue*, it must coincide with the question, and it must be *incontinenti*, immediately consecutive upon the question; e.g. *Mille aureos mihi dare spondes? Spondeo*, or *Mihi dare promittis? Promitto*. If one stipulated that a slave should be given him, and the opposite party replied that he would give a horse, this was no stipulation. If a stipulation took place *sine causa*, without sufficient consideration, it could not be enforced²; but the solemn form presumed this unless the contrary were proved. The contracting parties were called *rei*. He who put the question was *reus stipulandi*; the person who bound himself by his answer was *reus promittendi*. Two or more persons might be concerned on either side of this contract, in which case they were called *correi stipulandi*, and *correi promittendi*.

Rei stipu-
landi.

A stipulation was either positive or conditional; and might be performable on a certain day, or at a

¹ Hein. *El.* 829.

² *D.* XLVI. 1. 15.

certain place. If positive, the performance might be compelled forthwith, *dies cedit ac statim venit*. If conditional, pendente conditione, *dies nec cedit nec venit*¹. Conditions must be possible and lawful. A negative condition made the contract void; thus, *Si in capitolium non ascendero quinque aureos dare spondes?* because payment would never be demanded by the stipulator as long as he was alive². An impossible condition made the contract void³.

CHAP.
VI.Positive or
condi-
tional.

When several parties were concerned on one or both sides of this contract, if the *rei* bound themselves separately, each was liable for his share of the whole⁴; but if they were *correi stipulandi*, or *promittendi*, they were jointly and severally liable⁵, i.e. each was liable *in solidum* as well as for his *pars virilis*; the object being the greater security to those to whom the performance was due. The form of executing this stipulation was that the co-stipulators each asked *centum mihi dare spondes?* to which each of the co-promisors answered, *utrique vestrum dare spondeo*; whereby each became liable *in solidum*; and should one only be solvent he must pay the whole. Justinian introduced the *beneficium divisionis* in favour of the *correi promittendi*, whereby a co-promisor was not compelled to pay *in solidum* at once, but on payment of his share might give an undertaking to pay the whole if the creditor failed in making his co-obligees contribute their parts⁶. All could stipulate who could contract, therefore *furiosi* and *prodigi* could not stipulate; nor a *pupillus* without the authority of his tutor; but a slave could stipulate for his master, and a *servus communis* for his masters, generally the benefit being divided according to the shares they respectively held in him, unless he specially stipulated for one in particular. A *servus publicus* could also stipulate for the *universitas*

Correi
stipulandi.Correi pro-
mittendi.

Servus.

Servus
communis.

Publicus.

¹ See *ante*, book II. ch. 7.² *D.* XLIV. 7. 32.³ *D.* XLV. 2. 2. and 3.⁴ *I.* III. 16. 4.⁵ *D.* XLV. 2. 11. 1. and 2.⁶ Colq. 1589.

BOOK
III.*Hereditarius.**Filius familias.**Voluntary and necessary.**Prætorian.**Judicial.**Common.**Void stipulations.**1. As to persons.**2. As to things.**3. Defect in form, &c.*

to which he belonged¹. A *servus hereditarius* was allowed to stipulate from the nature of his duties; and whatever he acquired accrued to the inheritance, and so ultimately to whomsoever might prove to be heir. A *filius familias* could stipulate, except in cases of loan, which were contrary to the *scutum macedonianum*². With the above exceptions no one could stipulate for another³.

Stipulations were, 1. Voluntary. 2. Necessary. 1. Voluntary were those entered into in all private business, according to the agreements between the parties concerned. 2. Necessary were divided into (1) Prætorian, (2) Judicial, (3) Common. A necessary stipulation was that which was enforced by a court, or by the law.

1. Prætorian stipulations were those which were entered into by order of the Prætor; such as in the case of *damnum infectum*, damage likely to happen, as where one was ordered to repair the ruinous state of his house which had become dangerous to his neighbour. Also in the case of *cautio legatorum nomine*, where the heir was compelled to bind himself for the payment of legacies due at a future day. 2. Judicial stipulations were those ordered by a judex, as in the case of the restoration of a runaway slave. 3. Common. The stipulation entered into by the tutor for the due administration of the affairs of his pupil is an example.

Stipulations were often *inutiles*, or void: 1. By reason of the persons contracting. 2. The things contracted for. 3. Defect in the form of contract.

1. As regards the persons of the contracting parties: infants, madmen, deaf and dumb persons could not stipulate; nor could a father with a son, nor a master with his slave. 2. As to the subject matter of the contract: it must be something in existence, or capable of existence, and *in commercio*. 3. The form of the contract: if the parties

¹ D. XLV. 3. 3.² D. XIV. 6. 1.³ I. III. 18. 1.

non de eadem re sentiant; if there is an error not merely in the name, but the person of another; if an impossible condition were annexed¹; if the interrogation be simple, and the reply hypothetical; in all these cases the contract was void. CHAP.
VI.

In the contract of stipulation, a person called *adstipulator*² was sometimes introduced, who appears to have been invested by the stipulator with the powers of an agent to carry out the contract in his absence, or in case of his death³. He could receive payment of what was due, and was bound to account to the *stipulator* and his heirs. To give him this power, he was obliged also to go through the form of stipulation with the *promissor*, but might use a different form of words from the *stipulator*⁴. He might stipulate for less than the principal, but not more; and could bring the *actio ex stipulatu*, which did not extend to his heir⁵.

On the side of the *promissor* other parties were sometimes bound as additional security; these were called *sponsores* or *fidepromissores*; and Gaius draws a wide distinction between them and *fidejussores*. There was no difference between the *sponsor* and the *fidejussor*, but they were strictly confined to the contract of stipulation. If the stipulator addressed the surety in these words, *Idem dari spondes?* he was called *sponsor*. If thus, *Idem fidepromittis?* he was called *fidepromissor*⁶. They were not liable *in solidum* for the debt of the principal, but each for his *pars virilis*, which liability did not extend to their heirs; and by a provision of the *lex Furia* they could not be sued after two years; but it appears there was no limit to their liability in the provinces, and they were severally liable⁷. Sponsor
and Fide-
promissor.

Fidejussio was a contract in which a person bound himself as a surety for another by stipulation Fidejussor.

¹ D. XLIV. 7. 32.

² Id. III. 110. 111.

³ Id. III. 115. 116.

⁴ Gai. III. 117.

⁵ Gai. III. 112. 114.

⁶ Id. III. 120. 121.

BOOK
III.Liabilities
of.

without discharging the obligation of the principal. The *fidejussor* was a collateral security in case of the failure of the principal, and might be required in every kind of contract¹. *Fidejussor omnibus obligationibus, id est, sive re, sive verbis, sive litteris, sive consensu contractæ fuerint obligationes, adjici potest*². Fidejussors might be required in natural as well as civil obligations³; but in no case could they be bound for a greater sum than the principal owed⁴, nor for a different thing⁵. There was no limit as to time in the liability of fidejussors, *perpetuo tenentur*, and each was liable *in solidum*, which liability devolved upon their heirs⁶.

If the principal paid his debt, the sureties were forthwith discharged from all liability. If there were more sureties than one, the creditor might sue which of them he pleased for the whole debt, and that without first suing the principal debtor. Before the time of Justinian, if the creditor called on one of the *confidejussores*, whom he knew to be solvent, he was bound, on the payment of his demand, to make over to him his own right of action against the other *confidejussores*⁷; and to relieve sureties in such circumstances the law allowed them three advantages :

Beneficium { 1. Divisionis.
2. Ordinis sive excussionis.
3. Cedendarum actionum.

Beneficium,
1. Divisionis.

1. The *beneficium divisionis* was originally granted by a rescript of the emperor Hadrian, whereby if all the co-sureties were at hand, and were solvent, he whom the creditor pitched upon for payment might demand that his share should be accepted, and that the creditor should sue the others for their shares; but if he neglected to do this, and paid the whole, he had no remedy against

¹ D. XLVI. 1. 1.² Gai. III. 119.³ Id.⁴ I. III. 21. 5.⁵ D. XLVI. 1. 42.⁶ Gai. III. 120. 121.⁷ D. XLVI. 1. 17.

his co-sureties¹, for as the *fidejussores* were all and each liable to the creditor for the whole sum, there was no privity of contract as between each other. CHAP.
VI.

2. *Beneficium ordinis, sive excussionis.* It ^{2. Ordinis.} could scarcely be just on the part of the creditor to sue the surety before the principal; Justinian, therefore, determined² that the surety might demand the principal debtor should first be sued; still the law did not prevent the creditor from suing the surety first, for if he could show that it would be useless to sue the principal, the *exceptio ordinis* was of no avail.

3. *Beneficium cedendarum actionum*, was where ^{3. Cedendarum actionum.} a solvent surety, on payment of the debt, first took from the creditor a *cessio* of the right of action against his co-sureties for their shares; and this he must do before he paid the money, because on receipt of the debt the creditors' rights were extinguished. The surety who had thus paid the debt could then compel his co-sureties who were solvent to pay *pro rata*³. Women were forbidden by the *Sctum Velleianum*⁴ from acting as sureties in all cases⁵; and if they were induced to bind themselves, the *Sctum* was a valid plea unless they had acted fraudulently.

¹ *I.* III. 21. 4.

² *Nov.* IV. ch. 1.

³ *D.* XLVI. 1. 17; *Id.* XXXIX.

⁴ *D.* XVI. 1. 1.

⁵ *Paul.* *R. S.* II. 11. 1. and 2.

CHAPTER VII.

Of Literal Contracts.

BOOK
III.

*Literal
Contract.
Definition.*

A LITERAL Contract is thus defined by Heineccius : *Est obligatio quo quis, qui chirographo se ex mutuo debere confessus est, idque intra biennium non retractavit, ex his ipsis litteris obligatur et conveniri potest, quamvis pecuniam non acceperit*¹.

We must not confound this with such written memoranda as might be appended to any contract, but it must be such a note in writing as *per se* involved an obligation upon which the party making it could be sued. The *chirographum*, therefore, the note of hand, for such it was, to be binding upon the party making it, must contain an obligation upon the face of it, not retracted within two years from the making; and it must admit a liability *ex causa mutui*. Two years having elapsed, the maker of the note was liable to pay the sum even if he had not received it; or, in other words, it being a note of hand at two years, that time having elapsed without the note being cancelled, he was, according to the form of the note, precluded from offering any defence to an action brought upon it. The creditor could not sue upon the note till the two years were expired; if he did, the *exceptio* (plea) of *non numeratæ pecuniæ* was a sufficient defence². If the debtor had not received the money, he might, before the expiration of two years, bring his *querela non numeratæ pecuniæ*, or recover his note by the *condictio sine causa*³. The obligation, therefore, arising out of a *chirographum*, was a payment *ex causa mutui*, and two

*Exceptio
non nume-
ratæ pecu-
niæ.*

¹ Hein. *El.* 888.

² *C.* IV. 30. 7.

³ *C.* IV. 30. 14. 4.

years having elapsed, a *condictio* lay against the maker and his heirs, to enforce payment of the sum mentioned in it. CHAP.
VII.

The above describes a literal contract originally entered into as such; but *chirographa* were often not in themselves the contract, but evidence of some one or more preceding contracts which had been by agreement afterwards reduced to that form. Thus, one to whom a hundred *aurei* were due, *ex causa locationis*, desiring for his greater security to make it a literal contract, used this form, which was put into writing: "*Centum aureos, quos mihi ex causa locationis debes, expensos tibi tuli?*" to which the debtor subjoined also in writing, "*Expensos mihi tulisti,*" and signed his name: thus the immediate, and original, liability *ex locatione* was at an end, the debtor admitted that he owed 100 *aurei ex causa mutui*, and the creditor could sue him upon the note *condictione ex chirographo*¹. This is what was called a novation. *Novatio est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio: hoc est, cum ex precedenti causa ita constituatur ut prior perimatur*². Chiro-grapha.
Novation.

A note in writing was also used for transferring debts from one person to another³.

The *obligatio ex chirographo* was a unilateral contract in which the party bound himself in a certain sum, as we should say, to the holder of the note. In a *syngrapha*, where both parties signed, there was a mutual liability, and it was therefore a bilateral contract, producing an action *directa* and *contraria*. Syngrapha.

We may safely infer this, since *nomen* was used to signify a debt. Justinian disposes of the subject very briefly, and very little is to be gained from the Institutes respecting this contract⁴.

¹ Hein. *Ant.* III. 22. 4.

² *D.* XLVI. 2. 1.

³ Gai. III. 130.

⁴ *I.* III. 22.

CHAPTER VIII.

Of Consensual Contracts.

BOOK
III.

*Consensual
Contracts,
what.*

*Emptio
venditio.
Definition.*

Consensus.

Res.

Pretium.

CONSENSUAL Contracts are those in which the consent alone of the parties perfects the contract; these are five in number: 1. *Emptio Venditio*. 2. *Locatio Conductio*. 3. *Emphyteusis*. 4. *Societas*. 5. *Mandatum*. All these are contracts *bonæ fidei*.

1. *Emptio Venditio*, or buying and selling, is a contract by which goods are delivered from one man to another for a certain price. *Emptio et venditio est contractus consensualis de re pro certo pretio tradenda*¹. Three things are requisite in this contract: (1.) *Consensus*. (2.) *Res de qua consentitur*, and (3.) *Pretium*. The contract is perfect as soon as the price is agreed upon²; and may be effected between parties who are absent, by an agent, or by letter³.

(1.) Consent duly expressed is all that is required to perfect the contract, presuming there is neither error, fraud, force nor fear concerned in the transaction. If any condition be annexed to the consent the sale is not complete till the condition be fulfilled⁴.

(2.) *Res* or *merx de qua consentitur*. This may be any thing that is *in commercio*, and capable of being transferred from the seller to the buyer. *Res futurae*, as the future crop of a field, or *res incertae*, as the *jactus retis*, buying of a fisherman the next cast of his net.

(3.) *Pretium* must consist of *pecunia numerata*, and not of another commodity, as that would be

¹ Hein. *El.* 898.

² *D.* XVIII. 1. 1. 2.

³ *D.* XVIII. 1. 2. 1.

⁴ *D.* XVIII. 1. 7.

exchange and not sale, and would in fact be only the innominate contract of *Do ut des*. The price must be fair, representing the true value of the thing; and fixed, except where it is agreed to leave it to the decision of a third party. When the consent has been duly expressed on both sides the contract is complete, and it could not be rescinded except by mutual agreement¹. Justinian determined that if the buyer refused to fulfil the contract by accepting the thing sold, he should forfeit his *arrha* or earnest which he had given to bind the bargain. If the vendor refused to deliver the thing sold, he must restore the *arrha* twofold². CHAP. VIII.

The vendor is bound not only not to conceal, but to declare any defect existing in the subject of purchase; he is liable for his *reticentia* if thereby the buyer be deceived: *Si quis reticuit et emptorem decepit*³. The edile by his edict declared that vendors were required *certiores facere emptores quid morbi vitique cuique sit*, and *palam recte pronunciare*, to point out any flaw in the article sold, so that the rule of the civil law is *caveat venditor*; for if, without being guilty of misrepresentation, he failed to point out existing defects, whereby the purchaser was induced to buy that which he would otherwise have rejected, the *actio redhibitoria* would lie against him to rescind the bargain⁴. If the value of the thing purchased were less than that represented, whereby the buyer paid a higher price than he otherwise would have done, the *actio quanti minoris* lies against the vendor for the return of a portion of the price paid: as where he had puffed off a slave as *optimus cocus*⁵, a first-rate cook, and he proved a very indifferent one, he could be compelled to return a part of the price paid. The seller is not bound to deliver the thing sold until the price is paid⁶. If any damage occur to Redhibitio.

¹ C. IV. 10. 5.² D. XIX. 1. 13.³ D. XXI. 1. 18. 1.⁴ I. III. 24.⁵ D. XXI. 1. 21.⁶ D. XVIII. 1. 19.

BOOK
III.Liability of
vendor and
purchaser.

the thing sold whilst in the hands of the seller, it falls upon the buyer unless the seller have been guilty of *dolus* or *culpa*; for *periculum et commodum rei venditæ statim ad emptorem transit*¹. The vendor is liable for *culpa levis*, and even for *casus* if he take all risks (*periculum*) upon himself². If the purchase be made subject to tasting, or measuring, as in the case of wine, and before it is tasted it becomes sour, though sound when sold, the loss is to the vendor.

Addictio in
diem.

Addictio in diem: this was a conditional sale. If no one will give a higher price by a certain day, you shall have it³.

Pactum
commissio-
rium.

Pactum Commissorium was where in the sale the vendor stipulated that if the money were not paid by a certain day the bargain was off⁴. The actions in this contract were *directa* and *contraria*. The *actio empti* lay for the purchaser, who having paid the price could compel the vendor to deliver the thing purchased with all its appurtenances, and any increase which might have attached to it since the sale, such as the young of animals⁵, or fruits of the soil.

The *actio Venditi* lies for the vendor, who had delivered the thing sold, against the purchaser and his *heredes*, for the payment of the price, and for interest from the date when payment ought to have been made; and also for any loss he might incidentally have experienced.

Locatio
conductio.

2. *Locatio Conductio*, or letting and hiring, is a contract by which the use of a thing, or the labour of a person, is granted by one man to another for a certain time, in consideration of a certain

Definition.

rent. *Locatio conductio est contractus consensualis de usu rei ad certum tempus, vel opera pro certa mercede præstandis*⁶. Three things are therefore essential to constitute this contract. (1.) *Consensus*. (2.) *Rei usus, vel operæ*. (3.) *Mercēs*.

¹ D. XVIII. 6. 8.² D. XVIII. 6. 1.³ D. XVIII. 2. 1.⁴ D. XVIII. 3. 2.⁵ D. XIX. 1. 13. 10.⁶ Hein. *El.* 916.

(1.) *Consensus*. As soon as the parties had agreed upon the subject of the letting and hiring, and the *merces* to be paid by the *conductor* to the *locator*, the contract was complete. CHAP.
VIII.

(2.) *Res vel Opera*. Every thing could be let and hired which was *in commercio*, provided it was not consumed in the use, or not contrary to law, or *contra bonos mores*.

(3.) *Merces*. This must consist of money ; for *Merces*. if the bargain were to give some *thing* for the specified use, or to do something in return for the thing done, it would immediately become the innominate contract of *Facio ut des*, or *Facio ut facias*. The *merces*, i.e. the rent or wages, must be a fair remuneration¹; a nominal sum will not constitute the contract; and it must be fixed either between the parties, or left to arbitration.

As regards the liabilities of the parties, since *Liabilities of parties*. the advantage is for the most part reciprocal, each is responsible for *culpa levis*. If the *locator* let out leaky casks, and the wine of the hirer were lost, he must indemnify the hirer, because it was his duty to see that the casks were sound. If he let a pasture for feeding cattle in which noxious herbs grew, fatal to the health or life of the cattle, if he knew this he must make good the loss occasioned to the hirer, if not he loses his rent². The *conductor*, on the other hand, must use all due care and diligence in the use of the thing hired, or in the work he undertakes to perform³. But the amount of care and diligence on the part of the *conductor* must depend on the nature of the work to be performed ; in the case of a carrier, for instance, where goods of a fragile nature are committed to his care, he is answerable for *culpa levissima*⁴. And in all cases he is liable unless he use as much care as the nature of the things entrusted to him require. The actions in this contract are *locati* and *conducti*. The *Actions*.

¹ D. XIX. 2. 46.

² D. XIX. 2. 19. 1.

³ D. XIX. 2. 25. 3 ; D. XIX. 2. 13. 6.

⁴ D. XIX. 2. 25. 7.

BOOK
III.

actio locati lies for the letter against the hirer and his *heredes* for the payment of the *merces* with interest in case of delay, and for the return of the thing let, with damages for any injury occasioned by the *culpa levis* of the hirer.

The *actio conducti* lies for the hirer against the letter and his *heredes* to recover damages for any loss or injury occasioned by the *culpa* of the letter; as letting him a leaky cask, or a kicking horse; and also for any necessary expenses he may have been put to for the safe keeping of the thing let.

Emphyteusis.

3. *Emphyteusis* is a contract by which lands, or houses were given in perpetuity, or for a long time, on condition that the tenant shall improve the lands, and pay a yearly canon, or quit rent, to the proprietor: *Est contractus consensualis de dominio utili prædii alteri in perpetuum, vel ad tempus non modicum, pro certo anno canone in agnitionem domini præstito, concedendo*¹.

Definition.

Origin of.

This first became a recognized contract under the Emperor Zeno². Before that period it was not determined whether it was a letting or a sale, as it partook of the nature of both. The term is derived from *ἐμφυτεύειν*, to plant or improve. It having become the practice to let out the *ager vectigalis* either in perpetuity, or on long leases, by degrees corporate bodies, and private individuals, began to grant long leases of their waste and uncultivated lands, which no one would take for a short period. The owner of the lands was called *dominus emphyteuseos*, and the tenant *emphyteuta*, who had the *jus in re* and the *dominium utile*, for he not only could take all the fruits of the soil, but he could do anything with the property provided he improved it; besides, he could sell his lease and improvements with the concurrence of the grantor; the vendee taking his place, and fulfilling all the conditions of the original grant; the dominus em-

¹ D. VI. 3. 1. 1; Hein. *El.* 933.

² C. IV. 66. 1.

* There is another derivation given viz. "a name arising from there being a new ownership, or what almost amounted to a new ownership" "engrafted on (ἐν φύτεύειν) 'the real dominium'". Sander, p. 2

phyteuseos receiving a fiftieth part of the price at each alienation, called *laudemium*¹. CHAP. VIII.

The emphyteuta paid an *annuus canon* in acknowledgment of the rights of the grantor, and consequently neither usucapion nor prescription could be pleaded by the grantee; for if he neglected to pay the *canon* for two years in ecclesiastical emphyteutes, or three in civil, he was ousted of his possession. Laudemium.
Canon.

The *jus emphyteuseos* was extinguished: 1. By consolidation, i.e. where the *dominus emphyteuseos* purchased the lease, or *vice versa*, where the tenant purchased the land. 2. By non-payment of the *canon*. 3. By alienating without the knowledge of the lord. 4. By permitting the property to fall into a ruinous condition². From this contract of the civil law evidently sprung the long leases of corporations and colleges³. The jus
Emphyteu-
seos how
extin-
guished.

4. *Societas*, or partnership, is a contract by which the goods or labour of two or more are united in a common stock for the sake of sharing the gain. *Societas est contractus consensualis, de re vel operis communicandis, lucri in commune faciendi causa*. A partnership is duly constituted by consent, which may be either express or implied⁴; and the capital contributed by the respective partners may be equal or unequal; and may consist of property, or labour, or of both⁵. A partnership is either public or private; universal, called *societas omnium bonorum*; general, special, perpetual, or temporal⁶. *Public*, are those of the tax-contractors called *publicani*. *Private*, are partnerships confined to private trading operations. *Universal*, where the parties embark all their existing and future property⁷. *Perpetual*, is where the object of the partnership is of a perpetual nature, such as to Societas.

Definition.

Express or
implied.

Public.
Private.
Universal.
Perpetual.

¹ C. IV. 66. 3.

² *Id.*

³ Dr Colquhoun's work contains an elaborate treatise on this contract.

⁴ D. XVII. 2. 4.

⁵ D. XVII. 2. 5. 1.

⁶ Colq. 1726.

⁷ D. XVII. 2. 73.

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III.Tempo-
rary.Division of
profits.Liability of
partners.Actio pro
socio.

supply a town with water. *Temporary*, where the contract is at an end when the object for which it was entered into is effected; as where a mason and carpenter enter into a partnership to build a certain house, as soon as the house is finished the partnership ceases¹. No partner is bound to account to his co-partners for that which he gained from other sources², such as *legata*, *mortis causa donationes*, &c. If no agreement existed to the contrary, the partners shared the profit and loss equally; but this was open to arrangement according to the share of capital advanced, either as money or labour; but no agreement would be valid that one should take all the profit and the other bear all the loss, which was called the *societas leonina*³.

A partner is bound to the same care and diligence as he exercises in his own private affairs, and if guilty of negligence he is answerable to his co-partners; nor can he plead extra diligence in one case as a set-off against negligence in another⁴. He is not liable for *casus*; and is entitled to be reimbursed all charges and expenses he has been at on the partnership account⁵. The acts of one partner do not bind the rest if he act without authority, or beyond the scope of the partnership; otherwise his acts bind the partnership for profit or loss. If one partner introduce a stranger into the *societas* he does not thereby become a partner; for *socii mei socius non est meus socius*⁶.

The *actio pro socio*, which is an action *bonæ fidei*, lies for one partner against another to compel the due division of profits, and the payment of any damage occasioned by *culpa levis*. This only was the case *durante societate*; for if any question arose at the dissolution of the partnership it was settled by the *judicium communi dividundo*; and if a stranger had a claim upon the parties, in that case

¹ Colq. 1726.² *Id.* 29.³ *Id.* LII. 15.⁴ *D.* XVII. 2. 71. 1.⁵ *Id.* 26.⁶ *D.* XVII. 2. 20.

he would sue in an action *ex contractu*, by which he could recover from the contracting party *in solidum*, or from the members of the dissolved *societas* rateably according as the contract was that of the individual or of the *societas*¹.

CHAP.
VIII.

A *societas* was dissolved seven different ways:—

How dissolved.

1. By mutual consent².
2. By one of the partners retiring, providing this was not done fraudulently, or in a way to damage the others³.
3. By the natural death of one of the partners⁴.
4. By the civil death⁵.
4. By the bankruptcy of the *societas*⁶.
6. By destruction of the property⁷.
7. By the expiration of the time for which the contract was made.

The fifth and last consensual contract is *mandatum*, a commission, by which a lawful business is committed to the management of another, and by him undertaken to be performed without pay or reward: *Est contractus consensualis quo negotium honestum ab alio ex fiducia commissum, gratis administrandum gerendumque suscipitur*⁸. The term is supposed to be derived *a manus datione*, the token of agreement between the parties, the one to give, and the other to execute the commission.

Definition.

We must be careful not to confound this with the contract of *negotiorum gestio*⁹, which is a *quasi* contract, and where no commission is given; nor with hiring, because it is gratuitous; nor with mere advice, because in such case no obligation ensues¹⁰, unless it involve a fraud against a third party, and then the *obligatio ex delicto* would arise; nor with *jussus*, whereby we command servants, and those under our control, to perform certain acts.

¹ D. XVII. 17. 2. 82.

² D. XVII. 2. 63. 10.

³ Id. LXV. 3.

⁴ Id. LXV. 9.

⁵ I. IV. 1.

⁶ D. XVII. 2. 65. 12.

⁷ Id. LXIII. 10.

⁸ Hein. El. 953.

⁹ See *post* Chap. 9.

¹⁰ D. L. 17. 47.

BOOK
III.

*Might be
constituted
five ways.*

No fixed form is necessary to constitute a *mandatum*¹, which may be done verbally, or by letter; and it may even arise by mere presumption, where one permits another to transact his business for him². A *mandatum* might be general, or special; the former embracing the general management of the *mandans*, or only some particular commission confided to the *mandatarius*; and might arise five ways: *sive mea tantum gratia tibi mandem*; *sive aliena tantum*; *sive mea et aliena*; *sive mea et tua*; *sive tua et aliena*³.

*No pay-
ment.*

A *mandatum* is contracted by consent only. The subject of the contract must not involve any illegal or immoral act; for *rei turpis nullum mandatum est*⁴. There can be no payment (*merces*) involved, but a *honorarium* will not destroy the character of the contract⁵. If the *mandatarius* exceeded the powers conferred on him by the *mandans*, the latter was not bound by his acts⁶.

Since the *mandatarius* was selected on account of the trust reposed in him, if he delegated his commission to a third party he did so at the risk of breaking the contract, but if the instructions of the *mandans* were fully performed he would be liable.

*Might be
cancelled
or revoked.*

A *mandatum* might be cancelled by the mutual consent of the parties, or revoked by the *mandans*, or renounced by the *mandatarius*, *re integra*⁷, that is, when *integrum jus mandatori reservetur vel per se, vel per alium, eandem rem commode explicandi*⁸. Lastly, by the death of either of the parties *re integra*; but it would appear that if the business were in that state at the time of death, that there could have been no revocation, the liabilities devolved upon the heir⁹. The *mandatarius* having voluntarily undertaken that which he might have

Liability.

¹ D. XVII. 1. 1. 2.

² D. XVII. 1. 6. 2.

³ D. XVII. 1. 2.

⁴ D. XVII. 1. 6. 3.

⁵ D. XVII. 1. 6.

⁶ D. XVII. 1. 5.

⁷ I. III. 27. 9. and 11.

⁸ D. XVII. 1. 22. 11.

⁹ D. XVII. 1. 2. 6. *Id.* XXVII. 3.

declined, was liable for *culpa levissima*¹; if guilty of fraud, or *culpa lata*, he was *notus infamia*².

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VIII.

This contract gives rise to the *actio mandati* Actions. *directa*, and *contraria*. The former lies for the *mandans* against the *mandatarius* and his *heredes*, to compel the performance of the contract, and to recover such damages as may have been occasioned by his negligence; the latter, to indemnify the *mandatarius* for any loss he may have sustained. Dr Hallifax says that in the Laws of England the contract of *mandatum* is of no use. In this he is mistaken, because the Law of England distinctly recognizes the liability of unremunerated agents, who stand in the same position as the *mandatarius* of the Civil Law³. Story, in his *Commentaries on Bailments*, includes the contract of *mandatum*; but the Civil Law takes a much wider view of the contract. A *mandatum* may include a bailment, "a delivery of goods," &c. according to the definition of Sir William Jones; but the *mandatum* of the civilians is *omne negotium honestum gratis susceptum*, and does not necessarily involve the delivery of any thing.

¹ C. IV. 35. 13. and 21.

² D. III. 2. 1.

³ See *Coggs v. Bernard* Smith's Leading Cases, Vol. I., and Story On *Bailments*.

CHAPTER IX.

Of Obligations quasi ex contractu, or from Implied Contracts.

BOOK III.

Implied contracts. Definition.

IMPLIED, or quasi contracts, are those in which the obligation is founded on the consent of the parties not expressed, but presumed: *Sunt facta honesta quibus et ignorantes obligantur, ex consensu, ob equitatem vel utilitatem, præsumpto*¹; because every one is presumed to consent to that which is for his benefit; and no one can be presumed to desire to enrich himself at another's expense; for *qui vult quod antecedit, non debet nolle quod consequitur*.

Quasi contracts were principally six, though many others might arise which it would not be easy to specify². They are as follows: 1. *Negotiorum gestio*. 2. *Tutela*. 3. *Rei communis administratio*. 4. *Hereditatis administratio*. 5. *Hereditatis aditio*. 6. *Indebiti solutio*.

Negotiorum gestio.

1. *Negotiorum gestio* is where one gratuitously transacts the business of another for his benefit upon his presumed consent; the consent of the principal being presumed because it is done to prevent an inevitable, or probable loss. The business done must therefore be gratuitously undertaken for the benefit of the *dominus negotiorum*, and without his consent. It must not be confounded with *mandatum*, in which the knowledge and request of the principal was the essential ingredient; nor with the duties of the *procurator* and *defensor*, who were only concerned in a *negotium judiciale*. A woman might be a *negotiorum gestor*³.

¹ Hein. *El.* 966.

² *Colq.* 1764.

³ *D.* III. 5. 3. 1.

The *gestor* must observe all due care in the performance of the business in hand¹. If it be a case in which he intermeddles without any urgent necessity he will be bound *ad diligentiam exactissimam*, and therefore is liable for *culpa levissima*; but if he be led to it by the extreme necessity of the case and the probable loss of the *dominus negotiorum*, he will only then be liable for *dolus* and *culpa lata*²; and if the *gestor* venture to do anything contrary to the usual custom and mode of business of the *dominus*, or involving more than ordinary risk, he will even be liable for *casus*³. The *gestor* must finally render an exact account to the *dominus*⁴. On the other hand, the *dominus negotiorum* must repay the *gestor* all expenses with interest⁵, and take upon himself all liabilities and costs where he has rightly conducted the *negotium*. If one should undertake the business of a madman⁶, or even make a mistake as to the person whose affairs he was managing, the contract would nevertheless be valid; as if I suppose I am transacting the business of Titius, and it turns out to be that of Sempronius⁷. If the business have been rightly commenced and carried on, the *gestor* will not be liable for *casus*⁸.

CHAP.
IX.

*Gestor, how
liable.*

The actions in this case are *directa* and *contraria*. *Directa*, on behalf of the *dominus negotiorum* against the *gestor* and his *heredes* to compel them to render a full account, and to indemnify him for any loss occasioned by his negligence.

Contraria lay for the *gestor* against the *dominus* and his *heredes*, to indemnify him for all necessary costs and expenses, provided the affair has been *utiliter gestum*; but if he have expended more money than was necessary he could not recover the excess⁹.

¹ D. L. 17. 23.

² D. III. 5. 11.

³ D. III. 5. 19. 4.

⁷ Id. V. 1.

⁴ D. III. 5. 3. 9.

⁵ C. II. 19. 2.

⁶ D. III. 5. 3. 5.

⁸ Id. X. 1.

⁹ D. III. 5. 25.

BOOK
III.

Tutela.

Actions.

Rei communis
administratio.Actio communi
dividendo.Hereditatis
administratio.Actio familiae
eriscundae.Hereditatis
aditio.

2. *Tutela* is a contract between tutor and pupil, by which the former is bound to administer faithfully the affairs of his pupil, and the latter to indemnify the tutor for all expenses incurred in the execution of his office. The office of tutor involves an implied contract, because the tutor is thereby bound faithfully to administer the affairs of the pupil¹, and the pupil, on the other hand, to indemnify the tutor for all necessary charges and expenses². The relative duties of these parties have already been considered³. The actions are *directa* and *contraria*; the former against the tutor to compel him to deliver a statement of his account, and to indemnify the pupil for all losses occasioned by his negligence⁴; the latter, to compel the pupil to reimburse the tutor for all expenses incurred on his behalf. A *utilis actio* lay also *directa* and *contraria*, as between minors and curators.

3. *Rei communis administratio* involved a *quasi* contract between two or more persons to whom the same thing had been given, or left by way of legacy, by which each was bound to divide the thing so possessed in common, and to allow for all extraordinary costs in the care or keeping of it⁵. To enforce this the *actio communi dividendo* was established⁶.

4. *Hereditatis administratio* was a *quasi* contract between coheirs to the same estate, by which each was bound to divide the inheritance, and to settle all accounts relating to it, in fair proportion⁷; and this was enforced by the *actio familiae eriscundae*, which lay for one coheir against another⁸.

5. *Hereditatis aditio* is a quasi contract *quo is qui hereditatem adiit cum legatariis et fideicom-*

¹ D. XXVI. 7. 1.² See Book I. chap. 9.³ I. III. 28. 3.⁷ I. III. 28. 4.⁵ I. III. 28. 2.⁶ D. XXVII. 3. 1.⁸ D. X. 3. 1.⁸ D. X. 2. 2.

*missariis contraxisse, seque ad legata et fideicommissa præstanda obligasse censetur*¹. The act of accepting the inheritance made the heir bound to the legatees to pay them the legacies left by the testator²; but this implied contract existed only between the *heres*, and the *legatarii*, and fideicommissaria; for the creditors to whom the estate of the deceased was indebted could sue the *heres* as they could have done the deceased; upon whom devolved not only his rights, but all his liabilities. From this contract arose the *actio personalis ex testamento* against the *heres* who had administered to the estate, to enforce the delivery of the *legata* and *fideicommissa*, with any accessions that might have accrued to them, with interest for the period of his delay³.

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6. *Indebiti solutio* was a contract by which he who by mistake had been paid what was not due to him was bound to make restitution to the person who had paid him. *Est quasi contractus quo quis ex errore facti⁴ id quod naturaliter indebitum erat solvendo, alterum, qui ex ignorantia accepit ad restitutionem obligasse censetur*⁵. It is therefore necessary to constitute this contract, that the payment and receipt should be with the ignorance of the payer and payee, and that the thing paid was *indebitum*⁶. If the payer knew he was paying what was not due he had no remedy, because he either intended it as a gift, or his intention was to vex the payer with an action, which the law would not countenance. If the payee receives with a knowledge it was not due, not only the *condictio indebiti*, but the *actio furti*, would lie against him. The *condictio indebiti* was an action *stricti juris* for the recovery of whatever had been paid *per errorem*, to compel the receiver and his *heres* to

Indebiti solutio.

Definition.

¹ Hein. *El.* 985.

² *I.* III. 28. 5.

³ *D.* XXXI. 33.

⁴ Whether an error in law was sufficient to support an action is doubtful. Vid. Colq. 1786 et seq.

⁵ Hein. *El.* 987.

⁶ *D.* XII. 6. 1. 1.

BOOK III. refund with all accessions from the time of payment.

A payment to the wrong person *per errorem* would support the action. Also in the case of payment to minors, prodigals, and women. This action must be distinguished from the *condictio causa data, causa non secuta*, as in the case of *do ut des*; also from the *condictio ob turpem causam*, as where I give you money not to commit murder¹; and from the *condictio sine causa*, as in the case of a *dos* given in consideration of an incestuous marriage, which may be recovered by that action from the want of consideration². It is obvious that we may be involved in the abovementioned contracts by those who act by our authority, and on our behalf, as a *filiusfamilias*, or a *servus*.

¹ D. XII. 5. 2.

² Colq. 1800.

CHAPTER X.

Of the way by which Obligations arising from Contracts are Dissolved.

OBLIGATIONS arising from Contracts were dissolved either, 1. *Ope exceptionis*, or 2. *Ipsa jure*; in the former case, by the allegation and proof of some fact sufficient to defeat an action; in the latter, where the law took away the right of action.

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X.

*Contracts
how dis-
solved.*

1. *Ope Exceptionis*. Examples of this may be seen in *præscriptio*, where the defendant pleads the fact that he has been the *bona fide* possessor of the thing sought to be recovered for that period where-by the law assigns it to him; or a *res judicata*, where he pleads the judgment of a court in his favour in a former action.

*Ope excep-
tionis.*

2. *Ipsa Jure*. The ways in which obligations were dissolved by the operation of law, were, 1. Common to all contracts. 2. Peculiar to some, and exclusive of others.

Ipsa jure.

1. The ways common to all contracts were 1. *Solutio*. 2. *Compensatio*. 3. *Confusio*. 4. *Oblatio*. 5. *Rei Interitus*. 6. *Novatio*.

1. *Solutio*, payment, the ordinary mode of cancelling obligations, *quæ est vera præstatio ejus quod in obligatione est*¹; though the term *solutio* involves every satisfaction of a claim of whatever nature it may be². One thing cannot be given in satisfaction for another³, nor can payment be made by instalments unless by consent of the creditor⁴. Nor can the payment be properly made at any other time and place than that agreed on. The effect of payment is to liberate the debtor and his

Solutio.

¹ Hein. *El.* 998.

² *D. L.* 16. 176.

³ *D. XII.* 1. 2. 1.

⁴ *C. VIII.* 43. 9.

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III.

sureties, and to give him a right to resume full possession of any property which he may have pledged as security¹.

Compensatio.

2. *Compensatio*, or *debiti et crediti inter se contributio*², called in the law of England "set off," is where mutual debts are balanced against each other. If they be equal each extinguishes the other; if not, he against whom the balance is, is the debtor. It is essential that the debts be reciprocal, that is to say, they must be due in like manner; a debt due at a future day cannot be set off against that which is payable³.

Confusio.

When C. is debtor
and C. is creditor
the debt is extinguished

3. *Confusio*. This is when the obligation of the debtor and the right of the creditor coalesce in the same person; for as no one can be a debtor to himself, the debt is extinguished; as when the debtor becomes heir to his creditor⁴.

Oblatio et consignatio.

4. *Oblatio et consignatio*. This is where the debtor admits that a debt is due, but disputes the amount, and tenders the payment, which being refused by the creditor, he delivers it sealed up to the officer of the court. This is known in the English law as "paying money into court." If it turn out that he have paid the right sum into court he is free from all costs of suit, because the creditor has wrongly proceeded with his action.

Rei interitus.

5. *Rei interitus*. If the thing due perish, and that without the fault of the debtor, the debt is extinguished.

Novatio.

6. *Novatio, est prioris debiti in aliam obligationem, vel civilem vel naturalem transfusio, atque translatio*⁵, the changing an existing debt into a different obligation, which is by changing the debt itself, or the person of the debtor. A novation may arise in every contract⁶, and is either voluntary, or necessary.

Voluntary.

1. A voluntary novation arose by agreement

¹ D. XLVI. 3. 43.² D. XVI. 2. 7.³ D. XLVI. 2. 1.⁴ D. XVI. 2. 1.⁵ D. XLVI. 3. 75.⁶ Id. 2.

between the parties, when, (1.) The debtor remained the same, but the *nature* of the obligation is changed. (2.) When the debtor was changed by the transfer of the liability to another person.

CHAP.
X.

(1.) Where the debtor remains the same, e.g. *Change of debt.* where he who is liable *ex empto* makes himself liable for the same debt *ex stipulatione*; or where, having originally agreed to pay conditionally, he binds himself absolutely; but the prior obligation must be specially dissolved, or the debtor will be liable upon both¹.

(2.) Where the debt remains the same, but the *Change of debtor.* debtor is changed. This is done by delegation, which is *vice sua alium reum dare creditori*². This new *reus*, or party who takes upon himself the original liability, is called *expromissor*³; and is appointed by stipulation, by writing, or *nutu*, by tacit consent. The effect of this delegation is that the original debtor is entirely freed from his obligation, and that although it should turn out that the *expromissor* be insolvent⁴. The delegation must be with the consent of the creditor⁵. The *expromissor* is entirely distinct from the *fidejussor* or *adpromissor*, because with them the liability remains as long as the debt exists. *Expromissio* is also distinct from *cessio*, in which case the creditor assigns his rights to a third party, the original debtor remaining liable; and which is therefore no novation.

2. A necessary novation is in the case of a *Necessary. litis contestatio*, where the original debt was converted into a judgment debt, and was then recoverable by the *actio perpetua*, instead of the *actio temporalis*⁶.

Acceptilatio. This was a mode of dissolving a *Acceptilatio.* verbal contract by a verbal receipt; for *nihil tam*

¹ D. XLVI. 2. 2.

² Id. II.

³ I. VIII. 5.

⁴ D. XVII. 1. 26. 2.

⁵ C. VIII. 42. 1. and 6.

⁶ C. VIII. 42. ult. and Gai. III. 176—179.

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III.

Form of.

Form of
Gallus
Aquilinus.

*naturale est quam eo genere quidque dissolvi quo colligatum est*¹; and therefore it followed that *verborum obligatio verbis tolleretur*. *Acceptilatio* is defined by Modestinus as *liberatio per mutuam interrogationem*². This however could only apply to verbal contracts³, and the form of it was this: *Quod ego tibi promisi habesne acceptum*⁴? The creditor replied, *Habeo acceptum*. But Gallus Aquilius invented a form which made it applicable to other contracts. This was done by first reducing the contract to a verbal obligation, and then dissolving it by *acceptilatio*. Suppose Sempronius owed Titius 100 aurei on a note of hand, then Titius asked, *Quidquid te mihi ex chirographo dare oportet, tantam pecuniam tu mihi dare spondes?* To which Sempronius answered, *Spondeo*. Here a written obligation was shifted into a verbal one, which was capable of being dissolved by a verbal receipt; accordingly Sempronius then addresses Titius in this form: *Quid tibi jam me daturum sponsondi, id habesne a me acceptum?* To which Titius replied, *Habeo acceptum*; and the obligation was at an end.

A procurator could not give a discharge by *acceptilatio*, except by the special order of his principal⁵. Part of an obligation might be thus discharged if it were divisible⁶.

The last mode of dissolving a contract to be noticed is that of mutual consent. This could only take place *re integra*. As if Titius have agreed to sell his farm to Seius, and before the money be paid by Seius, and the possession of the farm be given by Titius, they agree to cancel the bargain, there is an end of the contract, otherwise any further agreement would constitute a fresh contract⁷.

¹ D. L. 17. 35.² *Id.* 3.³ D. XLVI. 4. 3.⁴ D. XLVI. 4. 1.⁵ I. III. 30. 1.⁶ D. XLVI. 4. 9. and 10.⁷ I. III. 30. 4.

CHAPTER XI.

Restitutio in Integrum.

RESTITUTIO in Integrum was also a mode of CHAP.
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dissolving obligations, though not noticed by Dr Hallifax, except incidentally under the head of "actions."

Ulpian says, *Hoc titulo plurifariam Prætor Restitutio hominibus vel lapsis vel circumscriptis subvenit: in Integrum. Sive metu, sive calliditate, sive ætate, sive absentia inciderunt in captionem; and Paulus adds, sive per status mutationem, aut justum errorem*¹.

The signification of the term *in integrum restitutio*, Definition. is the placing the complainant in the same position as he was before the transaction complained of, and by which he has been wrongfully damaged; and in its general acceptation it includes every relief granted to a person seeking through equity indemnity against the provisions of strict law, where such involves a hardship in some particular case². The applicant must prove damage of a serious nature arising out of the transaction in question³. If the plaintiff be able to repair the damage by the ordinary course of law he cannot resort to the *restitutio in integrum*⁴. The *restitutio* is also inoperative against such cases as are in themselves null; but if any one were placed in such a position as not to be able to avail himself of the plea of nullity, the *restitutio* would be granted him⁵. The edicts of the Prætor in reference to the *in integrum restitutio* stand in the Digest in the following order:

¹ D. IV. I. 1. and 2.

² Colq. 1863.

³ D. IV. I. 4. and D. IV. 4. 16. 4.

⁴ D. IV. 4. 16.

⁵ C. II. 20. 4.

BOOK
III.In what
cases
granted.

1. *Quod metus causa*¹, &c., where the plaintiff has been compelled by fear to do that which he would otherwise have refused.

2. *Quæ dolo malo*², &c., where he has been overreached by fraud.

3. *Quod cum minore*³, &c., where a minor has been swindled, or his estate mismanaged.

4. *Quod cum capite minutis*⁴, granting redress where, by the *capitis diminutio*, no one could sue, or be sued.

5. And, lastly, *Ex quibus causis majores*⁵, &c. involving those cases where parties have been unable to claim their rights in due time from unavoidable absence, or upon any ground which may be considered just or sufficient by the Prætor. This last included a general clause; *Item si qua alia mihi justa causa esse videbitur in integrum restitutam*.

We will now briefly examine each case.

How ob-
tained.

Restitution must be prayed before the Prætor in a formal suit; and the *judex* was thereupon empowered to restore, by virtue of his office, where the transaction was completed, and the defendant had got possession. It might also be obtained by plea, where pleaded to an action brought to enforce a contract, e.g. a stipulation extorted by fear⁶.

*Quod metus
causa.*

1. The *actio quod metus causa* includes every thing induced by force as well as fear. The force complained of must except all acts done under authority; and it must be such as would compel a man of strong mind and resolution to the unwilling performance of the act thereby sought to be cancelled. It must be *metus non vani hominis, sed qui merito et in hominem constantissimum cadat*⁷; though this must necessarily depend to a certain degree on the person, and the circum-

¹ D. IV. 2. 1.² D. IV. 3. 1. 1.³ D. IV. 4. 1. 1.⁴ D. IV. 5. 2. 1.⁵ D. IV. 6. 1. 1.⁶ D. IV. 2. 9. 3.⁷ D. IV. 2. 6.

stances of the case. *Metus* was principally available as a plea in answer to an action brought to compel the performance of an extorted agreement; but where in the transaction the complainant parted with the possession of his property, an action lay for the full restitution of the object sought to be recovered, together with all accessions in the interim.

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2. The *dolus* on which a claim to restitution could be grounded involved every *calliditas*, or *machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita*; but the Prætor would grant no relief under the Edict if the plaintiff had redress by an *actio civilis*, or *honoraria*. The words of the Edict are, *si de his rebus alia actio non esset*¹. Third parties, as the creditors of a bankrupt, could demand the *restitutio*, where property had been fraudulently made away with, by *actio Pauliana*²; but the action would not lie unless the creditors were *missi in possessionem bonorum*³, i. e. the debtor had been duly declared bankrupt, otherwise the creditors had the same remedy for annulling a transaction tainted with fraud that the debtor himself would have had⁴.

Quod dolo
malo.

3. *Quod cum minore quam viginti annis natus gestum esse dicetur, uti quæque res erit animadvertam*⁵. The restitution here promised by the Prætor applied to every one who had injured the minor. *Gestum*, says Ulpian, must be taken as the case may be, whether it be a contract, or any other transaction⁶. The *restitutio* lay also for a *filius familias* in respect to his *peculium castrense*⁷.

Quod cum
minore.

The minor could claim his property in the hands of a third party, if any loss he had experienced could not otherwise be repaired: e. g. a minor sold his farm, and conveyed it to the pur-

¹ D. IV. 3. 1. 4.

² D. XLII. 8. 1.

³ D. XLII. 8. 10. 16.

⁴ Id. 17. 1.

⁵ D. IV. 4. 1. 1.

⁶ Id. 7.

⁷ Id. 3. 10.

BOOK
III.

chaser, who afterwards sold it to a third party: if the second purchaser were aware of the facts of the case he must make good any loss. If he were ignorant, and the first purchaser were solvent, the second was not liable; but if the first were insolvent, the second must *at all events* make restitution¹. Where the minor had not parted with the possession of his property consequent upon a contract not authorized by his tutor or curator, the whole proceeding was a nullity. The heir of the minor was equally entitled to the benefit of the Edict.

Quod cum capite diminutis.

4. When a person had undergone the *minima capitis diminutio*², he could neither sue nor be sued; but the Prætor, to meet the equity of the case, declared *qui quæve, posteaquam quid cum his actum contractumve sit, capite diminuti diminutæ esse dicentur: in eos easve perinde quasi id factum non sit, judicium dabo*³. Whatever contracts therefore the parties had entered into while *sui juris*, of these the Prætor would after the *capitis diminutio* compel the performance. Arrogation, or the *conventio in manum* of a woman, would be cases in point.

Ex quibus causis majores, &c.

5. Without reference to minority, or any of the above-mentioned grounds, the Prætor gave relief to all who had been damaged by unavoidable absence or error⁴. Absence occasioned by fear, *mortis vel cruciatus*⁵, or *reipublicæ causa*⁶, or being in *publica custodia*⁷, or in servitude, as a *liber homo bona fide serviens*⁸, or as a prisoner of war⁹, entitled the applicant to relief for consequential damage or loss; but the Prætor did not promise relief on account of every damage from absence; it was confined to such only as might accrue to present or future property on the ground that the

What absence came within the Edict.

¹ D. IV. 4. 13. 1.

² D. IV. 5. 2.

³ D. IV. 5. 2. 1.

⁴ D. IV. 6. 1. 1.

⁵ D. IV. 6. 3.

⁶ Id. IV.

⁷ Id. IX.

⁸ Id. XI.

⁹ Id. XIV.

applicant was unable to enforce his right at the proper time¹. Where a legacy was left to one provided he were in Italy at the time of the testator's death, if out of Italy on public service, the Prætor would decree in his favour. The other principal ground of relief in this Edict was *justus error*², but *scienti non subvenit Prætor*³.

CHAP.
XI.

The edict concludes with a general clause: *si qua alia mihi justa causa esse videbitur in integrum restituum*⁴. This met every case where the applicant could prove damage without any fault of his own; and exhibits in a striking manner the latitude of the Prætor's jurisdiction.

¹ D. XLI. and XLIII.

² D. XXVII. 6. 1. 6.

³ D. IV. 1. 2.

⁴ D. IV. 6. 1. 1.

ROMAN CIVIL LAW.

BOOK IV.

OF THE RIGHTS OF THINGS.

CHAPTER I.

Obligations ex Delicto.

IN Contracts the obligation of the parties is voluntary : in Offences the law obliges them whether they will or no. CHAP.
I.

Offences are acts wilfully committed in violation of law ; and as regards the damages arising from them, they oblige the offender to make reparation ; for one of the sources of debt in civil society is that of wrong.

Wrong is a damage whenever a man has less than what is his, whether it be his by mere nature, or by some human act, as ownership. As indicating a vicious will offences render a man liable to suffer punishment¹. Punishment, in its general signification, is an evil suffered for an evil done. The chief end of punishment may be said to be amendment, and example, whereby to prevent future offences by making a better man of the offender, and by holding him up as an example to deter others². Wrong.
Punish-
ment.

As all offences depend upon the *animus* with which they are committed, it follows that all persons are capable of committing offences, and liable to the punishment appropriated to them who labour under no defect of will. Punishments by the law of Rome were *quædam capitalia, quædam non capitalia*³; the term capital including every case of civil as well as natural death. Punish-
ment by the
Civil Law.

Offences are, 1. Private. 2. Public. Offences.

Privatum delictum was that offence which brought with it the penalty of indemnification ; it applied between one member of the community Private.

¹ Grot. B. II. ch. 17.

² *Id.* ch. 20.

³ *D.* XLVIII. 1. 2.

BOOK
IV.

and another; the damage was of a personal nature, arising from the injury done, and extended to the heirs of the delinquent; such were the cases of *Furtum*, *Rapina*, *Damnum injuria datum*, and *Injuria*.

Public.

Publica delicta, called *publica judicia*, were wrongful acts of a public nature, and of which the laws took notice as injuries to the commonwealth; these were *Lex Julia Majestatis*¹; *Lex Julia de Adulteriis*²; *Lex Cornelia de Sicariis*³; *Lex Pompeia de Parricidiis*⁴; *Lex Cornelia de Falsis*⁵; *Lex Julia de vi publica et privata*⁶; *Lex Julia de peculatu*⁷; *Lex Fabia de Plagiariis*⁸; *Lex Julia repetundarum*.

Prosecu-
tion.
Civil and
Criminal.

The prosecution of private offences by the Roman law was, 1. Civil. 2. Criminal. This arose from the circumstance that *privata delicta* were regarded in a twofold point of view; the redress of the party injured, as well as the punishment of the offender; and whenever a civil and a criminal action were co-ordinate, either or both might be brought, nor did it matter which was proceeded with first. *Quoties de re familiari et civilis et criminalis competit actio utraque licet experiri*⁹. So if any one had been forcibly ejected from the possession of his property he might first recover by the interdict *unde vi*, and then proceed against the offender by the *Lex Julia de vi publica*; so that the civil prosecution of private offences was in order to redress an injury, as it affected an individual; and this redress was obtained, 1. by reparation of the damage done; 2. by punishment of the offender; 3. by both.

Criminal
prosecu-
tion.

The criminal prosecution of private offences was in order to punish a crime as it affected the community. This was done by corporal punish-

¹ D. XLVIII. 4. 1.² Id. 8. 1.³ Id. 10. 1.⁷ Id. 15.⁵ D. XLVIII. 5. 1.⁴ Id. 9. 1.⁶ Id. 6. and 7.⁸ Id. 13.⁹ C. IX. 31.

ment, the different degrees of which are enumerated by Ulpian: *Et sunt pænæ, quæ aut vitam adimunt et servitutem injungunt, aut civitatem auferunt, aut exilium aut coercionem corporis continent*¹. CHAP.
I.

Punishment was also pecuniary².

Delicta, or private offences, properly so called, *Delicta*, were four in number. 1. *Furtum*. 2. *Rapina*. 3. *Damnum*. 4. *Injuria*. Concerning these we will now proceed to inquire.

Furtum, or theft, is the fraudulent taking and carrying away of the moveable goods of another for the sake of gain. *Est contractatio rei fraudulosa lucri faciendi causa, vel etiam usus ejus, possessionisve, quod lege naturali prohibitum est admittere*³. From the definition, it appears that, by the civil law, theft might be committed not only by subtraction of the thing itself, belonging to another, but also by unlawfully using it, and by taking it from the lawful possession of another. *Furtum*.

Definition.

There could be no *furtum* without *contractatio*, a removal of the thing in question; or, as the English law expresses it, an *asportavit*; therefore he who entered a house with the intention to steal, but took nothing, was no *fur*, but if he entered by force, was liable to the *actio injuriarum*⁴. *Sola cogitatio furti faciendi non facit furem*⁵; but if one gave *opes et consilium* to another, whereupon a theft followed, he then became an accessory⁶. *Furtum* could not be committed with respect to such things as had no owner, because the definition implies the fraudulent taking of another's property: *res nullius occupanti cedunt*. The *res* of an *hereditas jacens* were not the subject of theft⁷. There could be no theft between husband and wife; but in case of a divorce, things abstracted by either during marriage might be recovered by the *actio* *Contractatio, what*.

¹ D. XLVIII. 19. 6. 2.

² D. XLVII. 2. 3.

³ I. 1. 1.

⁷ D. XLVII. 2. 68.

² D. XLVIII. 1. 2.

⁴ Id. 21. 7.

⁶ I. IV. 1. 11.

BOOK IV. *rerum amotarum*¹. Neither could a *filius familias* rob his father, on account of the *unitas personæ*².

*Must be
lucris
causa.*

The taking must be *lucris causa*, therefore if one carried off an *ancilla libidinis causa*, it was no theft³. If property were taken away *nocendi causa*, the party was liable by the *Lex Aquilia*. So also if it were done *contumeliæ causa*, as where one broke another's door, or gate, and thereby thieves carried off his property, he was liable to the *actio injuriarum*⁴.

*Furtum
rei.
Usus.*

Furtum rei was where one stole the property of another. *Furtum usus* was where the depositarius used the *res deposita*, or where the commodatarius used the *res commodata* otherwise than as agreed on, as riding a horse beyond the stipulated distance⁵. Or where the creditor used the *pignus*⁶.

Possessionis.

Furtum possessionis was where a man unlawfully possessed himself of his own property when in the hands of a creditor, as a pledge⁷.

As no theft could be committed where there was the absence of the *contrectatio fraudulosa*, it follows that *furiosi*, *dementes* and *infantes* could not be guilty of it; but one *pubertati proximus* might be so if he were sensible he was committing a criminal act. Gaius says, *Quia furtum ex adfectu consistit ita demum obligari eo crimine impuberem, si proximus pubertati sit, et ob id intelligat se delinquere*⁸, which involves the maxim that *malitia supplet ætatem*.

*Nocturnal
or Diurnal.*

Furtum was either nocturnal or diurnal. It was lawful to slay a nocturnal thief, *Si cum clamore testificetur*, provided you raised a "hue and cry." A diurnal thief might be slain if he used *telum* against you; but this must also be done *cum clamore*⁹.

¹ D. XXV. 2. 1.

² D. XLVII. 2. 16.

³ Id. XXXIX.

⁴ Id. LIII.

⁵ D. XLVII. 2. 4. and Gai. III. 195—197.

⁶ D. XLVII. 2. 54.

⁷ Id. XLVII. 2. 19. 5.

⁸ Gai. III. 208. I. IV. 1. 18.

⁹ D. IX. 2. 4. 1.

According to the Institutes, *furtum* was divided into four kinds: 1. *Conceptum*. 2. *Oblatum*. 3. *Prohibitum*. 4. *Non Exhibitum*. CHAP. I.

The theft called *conceptum*, was where stolen property was searched for and found in the possession of some person who had received it; against whom lay the *actio concepti*, as a receiver of stolen goods. It was called *oblatum* when the thief had delivered the stolen article to another person, the "fence" of the English pickpocket, that it might not be found upon himself. Here the *actio oblatis* lay against the receiver, whether he were conscious the thing were stolen or not. *Furtum prohibitum* was where one hindered another from searching for stolen goods, against whom lay the action *furti prohibiti*, the penalty of which was quadruple restitution by the authority of the Prætor's edict¹. And lastly, *Non exhibitum* was, where upon search stolen property was found, if not concealed, at least so disposed as not to be easily seen; against such the Prætor decreed the *actio furti non exhibiti*.

The penalties in case of *furtum conceptum*, and *oblatum*, were double and triple restitution respectively; *furtum conceptum* being treated as *furtum non manifestum*. All these distinctions in the time of Justinian became obsolete², and *furtum* was reduced to two kinds: 1. *Manifestum*. 2. *Nec manifestum*.

1. *Furtum manifestum* was, where the thief was taken in the act, or with the stolen property in his possession. 2. *Nec manifestum*, where he was not so taken³; or as Paulus says, *Nec manifestus fur est qui in faciendo quidem deprehensus non est, sed eum furtum fecisse negari non potest*⁴. We have observed that *furtum conceptum* was, where stolen goods were searched for, and found in the presence of witnesses in any one's possession, and then, according to the Twelve Tables, it became

¹ Gai. III. 192.

² I. IV. 1. 4.

³ Gai. III. 184. 185.

⁴ Paul. R. S. II. 31. 2.

BOOK
IV.*Lance et
licio.*

furtum manifestum, or rather was treated as such : *Si furtum lance licioque conceptum escit, atque uti manifestum vindicator*¹. Hence arises the question, what is meant by searching *lance licioque*? Festus says², that they who went to search for stolen goods, entered the house *licio cincti*, girt with a cloth, which Gaius calls *linteum quo necessariae partes tegerentur*³; they must therefore have been otherwise naked, *lancemque ante oculos tenebant*,—held a mask before their faces that they might not be recognized by the women of the house. But Gaius suggests that this might be to occupy their hands, and so prevent their stealing any thing; or to prevent their carrying in the property alleged to be stolen, and so falsely charge the master of the house. It appears to have been obsolete in the time of Gaius, and it is vain for us to attempt to explain that which he seems not to have understood⁴.

The redress in the case of *furtum* was of a double nature:

*Condictio
Furtiva.*

1. The *condictio furtiva*, which was an *actio persecutoria*, and could be brought by the owner of the property, and by him only, to recover the possession, together with compensation for damages. *In furtiva re soli domino condictio competit*⁵. The *heres* of the owner could bring the action, but not against the *heredes* of the thief, unless it had been commenced in the lifetime of the owner.

Actio furti.

2. The *actio furti* might be brought not only by the owner, but by every one who had an interest in the property; e.g. if a pawn were stolen from a creditor, clothes from the *fullo* or *sarcinator*, the fuller or tailor; or chattels lent to the *commodatarius*: in all these cases the person who had the possession of the property could bring the *actio furti*, because they were respectively liable to the

¹ Tab. VIII. Fr. 15.² Festus, *sub voce*.³ Gai. III. 193.⁴ Hein. Ant. IV. I. 19.⁵ D. XIII. 1. 1. because *actio personalis moritur cum persona*.

owner whose property they held. The owner of the property in such case could not avail himself of this action, because he was secured by the *actio locati*¹. CHAP.
I.

The above-mentioned actions were concurrent: the *actio furti* might first be brought for double, or quadruple damages, and then the *condictio furtiva* to recover the stolen thing².

The penalty in the case of *Furtum manifestum* was capital by the Twelve Tables³, afterwards reduced to quadruple restitution by the Prætor, and twofold restitution in case of *Furtum nec manifestum*. In all cases the offender was rendered infamous.

The next in order of the *delicta privata* is *RAPINA*, which may be defined as *violenta rei alienæ mobilis ablatio, lucri faciendi causa dolo malo facta*⁴. The chief distinction between this offence and *furtum* is that it is *vi et palam*, whereas in *furtum* the *contrectatio* was *fraudulosa*, without the owner's knowledge: chattels could only be the subject of it, because they only could be removed. If *res immobiles* were seized by violence it was termed *invasio*, which was redressed by the Prætor's interdict *unde vi*⁵. Rapina.
Definition.
Invasio.

This offence appears to have derived its origin from the edict of the Prætor, as no mention of it occurs in the Twelve Tables, previous to which we may suppose it was comprised in *furtum manifestum*. *Si cujus bona*, says the Prætor, *rapta esse dicentur, in eum qui id fecisse dicatur iudicium dabo*⁶. The penalty was quadruple restitution, which contained the thing itself, so that it was only, in fact, in triplum⁷, if the action were brought within the year. If after the year, simple restitu-

¹ Gai. III. 203. But in the English law both owner and bailee can prosecute.

² D. XLIV. 7. 34. 2.

⁴ Hein. *El.* 1071.

⁶ D. XLVII. 8. 2.

³ Gai. III. 189.

⁵ D. XLIII. 16. 1.

⁷ I. IV. 6. 19.

*Prætor's
Edict.*

- BOOK IV. tion. If committed by a slave, the *noxalis actio* lay against the master¹.
- Damnum.* The third *delictum privatum* is *damnum injuria datum*, which was redressed by the *Lex Aquilia*. *Definition.* *Damnum injuria datum est omnis patrimonii diminutio, nullo jure facta, et quidem ab homine libero*². Dr Colquhoun thus defines it: *Damnum rei sibi non pertinenti actu illegali malitiose sive culpose datum*³.
- Noxa.* Under the head of this delictum the civil law comprehends only that damage done to the property of another by a freeman. If occasioned by the act of a slave it was called *noxa*; if done by cattle, or other animals, it was termed *pauperies*. *Pauperies.* *Dolus* or *culpa* are essential to constitute this offence; and *culpa levissima* brought the offender within the verge of the law⁴.
- Lex Aquilia.* The date of the *Lex Aquilia* is uncertain. It appears to have been anterior to the time of Cicero, who mentions it⁵. It is supposed to have been passed by L. Aquilius, a tribune, A.U.C. 572⁶. At all events, it abrogated all laws anterior to it respecting *damnum injuria datum*; for Ulpian says: *Lex Aquilia omnibus legibus quæ ante se de damno injuria locutæ sunt derogavit: sive duodecem tabulis, sive alia quæ fuit*. The law consisted of three chapters, the first of which provided for the loss of slaves or cattle: *Qui servum alienum, quadrupedem, vel pecudem injuria occiderit, quanti id in eo anno plurimi fuit, tantum æs dare domino damnas esto*. The offender was to pay the highest price the slave or animal had been worth during the previous year.
- Chapter 1.* In estimating the damage, not merely the value of the animal was considered, but the consequential damages were also included, as in the
- Damage, how estimated.*

¹ D. XLVII. 8. 2.² Colq. 1916.³ In Bruto, c. 34.⁴ Hein. El. 1080.⁵ D. IX. 2. 44.⁶ Hein. Ant. IV. 3. 5.

case of a slave who had been appointed *heres*: if he were killed, the master was entitled, in addition to the price of the slave, to estimate the value of the *hereditas* which he had thus lost. If the slave were one of a company of actors, and by his death the company were rendered less efficient, this would increase the damage. So killing one of a pair of horses or mules whereby the other became of less value¹. The value of the animal killed is to be taken at the highest price it would have produced within the year, the time being reckoned back from the date of the injury².

CHAP.
I.

The second chapter of the *Lex Aquilia*, not inserted in the Digest, has been again brought to light by the discovery of the Institutes of Gaius, who gives it, or the substance of it, in these words: *In adstipulatorem qui pecuniam in fraudem stipulatoris acceptam fecerit quanti ei res esset, tanti actio constituitur*³. It gave an action to the stipulator against the adstipulator to recover money fraudulently received by him. By this chapter the stipulator, if so defrauded, could have recovered *in duplum* against his adstipulator if he denied the fraud⁴; but, as Gaius observes⁵, he might have recovered the money lost by the *actio mandati*; and this may account for the omission of the second chapter in the Digest.

Chapter 2.

The third chapter of the *Lex Aquilia* runs thus: *Cæterarum rerum, præter hominem et pecudem occisos, si quis alteri damnum faxit, quod usserit, fregerit, ruperit, quanti ea res erit in diebus triginta proximis tantum æs domino dare damnas esto*⁶. This includes all damage done to every kind of property, animate or inanimate, except killing, *servi et pecudes*; and Gaius includes dogs and wild beasts, such as bears and lions⁷.

Chapter 3.

¹ Gai. III. 212; D. IX. 2. 22.

² D. IX. 2. 21. 1.

³ Gai. III. 215.

⁴ D. IX. 2. 2. 1; I. IV. 6. 16.

⁵ Gai. III. 216.

⁶ D. IX. 2. 27. 5.

⁷ Gai. III. 217.

BOOK
IV.

Who liable
under the
Lex Aquilia.

No action could lie by the *Lex Aquilia* for killing a *liber homo*, because no one had a property in him. To bring a party within the provisions of the law the act done must be *injuria*, and to constitute this there must be *culpa*, however small¹. The Digest furnishes a most interesting collection of cases. The *medicus* who has administered a noxious clyster to his patient, the *obstetrix* who has mismanaged her lying-in woman, and the *tonsor* who shaved a slave where the game of tennis was going on, and the ball struck the razor and cut the slave's throat, are all cases, with numerous others, coming within this law, to be decided according to the *culpa* of the respective parties.

Imperitia.

It was an established maxim that *imperitia culpæ annumeratur*, and therefore whoever presumed to exercise a profession or trade, not being properly qualified to do so, was liable for all damage his want of skill or knowledge might occasion. The remedy to the party injured in all these cases was by the *actio Legis Aquiliæ*, which was either *directa*, or *in factum*², corresponding with the trespass and case of the English law. Where the *actio directa* would not lie, the Prætor dabat *actionem in factum*.

Injuria.

INJURIA is the fourth *delictum privatum* of the Civil Law. Ulpian says³, that *omne quod non jure fit is injuria*. But in its specific sense it denotes *contumelia*; and Labeo says that this may be *aut re, aut verbis*⁴; and therefore it may be defined as *quodvis dictum factumve ad alterius contumeliam dolo malo directum*⁵. Injuria was therefore either real or verbal; the former when any one was *pugno pulsatus, aut fuste percussus*⁶, assaulted, and beaten; or when *cui convicium factum fuerit*, slandered in public by calling a man a cuckold, or a woman a whore; or if *quis ad infamiam alicujus*

Definition.

Real or
Verbal.

¹ D. IX. 2. 44.

² D. XLVII. 10. 1.

³ Hein. *El.* 1096.

⁴ D. XIX. 5. 11.

⁵ *Id.*

⁶ Gai. III. 220.

libellum aut carmen scripserit, any one has written, and published a libel on the character of another¹. CHAP.
I.

Injuria could not be committed without the *animus injuriandi*: therefore a magistrate was not liable within the scope of his office, though his acts might conduce *ad contumeliam alterius*². If, in striking at my slave I accidentally hit a free man, this is no *injuria*, since the *animus injuriandi* was wanting³. Also if the act were done *per jocosum*, or mistaking a free man for a slave; and all were incapable of *injuria* who were *doli incapaces*⁴. An action lay not only for injury done to the plaintiff himself, but also when done to his wife, children, and slaves⁵. The party suing must prove *damnum injuria datum*, and the Prætor declared *qui agit injuriarum certum dicat quid injuriæ factum sit*⁶; the plaintiff must strictly specify the damage he has received, and prove it; and in the case of defamation the truth was a sufficient defence: *Eum qui nocentem infamavit non esse bonum æquum ob eam rem condemnari: peccata enim nocentium nota esse, et oportere et expedire*⁷. *Animus injuriandi.*

Proof of damage.

We have stated, that injuries were either real or verbal. The latter were confined to words spoken, i.e. the slander of the English Law; and both these were divided into simple and atrocious, by the law of the Twelve Tables, which distinction was drawn from the fact itself as *membri ruptura*; or where a man was grievously wounded, or beaten by another: or from the place where the injury was done, as in the theatre, or the forum; or the person upon whom it was committed, as a magistrate or a senator. The punishment by the law of the Twelve Tables in the case of *atrox injuria*, was retaliation: *Si membrum rupsit, ni cum eo* *Injuries were simple and atrocious.*

¹ Gai. III. 220.

² D. XLVII. 10. 32. and 33.

³ D. XLVII. 10. 4.

⁴ Id. 3. 1. and 3. and 4.

⁵ Gai. III. 221; and D. XLVII. 10. 18. 5.

⁶ D. XLVII. 10. 7.

⁷ Id. 18.

BOOK
IV.

*pacit, talio esto*¹. This gave the offending party the option of making amends, *ni cum eo pacit*, i.e. paying 300 aurei in case of a *liber homo*, and 150 in case of a slave, or of suffering the same himself. This law soon became inconsistent with a more refined state of society, and the Prætor interfered by his edict in the case of all injuries where the complainant could prove damage either to person or character; which the reader will find treated of by Ulpian, in *Law* 15, *D.* 47, 10, and which should be consulted.

Penalty.

The penalty imposed by the Prætor was pecuniary. The injured party was allowed to state his damages, and the Judex before whom the case was tried awarded such a sum as the nature of the case required². The cases reported in the *Digest* are

Injuries
were—

corpori,

as may be done to the body, *corpori*; the dignity, *dignitati*; or to the character, *famæ*³. Not only he who committed a battery, but all who aided and abetted him, were liable⁴. *Si quis pulsatus quidem non est, verum manus adversus eum levatæ*, had his remedy for an assault⁵. A case affecting the dignity would be the abduction of the *comes*, the page or attendant of a woman of rank⁶.

dignitati,

famæ.

Character, *fama*, might be injured by acts, words, writing, or painting. By pertinaciously following a virtuous woman, and *blanda oratione pudicitiam adtemptando*⁷. Or by raising a *convicium*, a public slander, against any one, as by inducing others to join in such abusive expressions as were *adversus bonos mores, quæque ad infamiam alicujus spectarent*⁸; or by writing and publishing that which defamed or ridiculed the character of another; also, the *injuria picta*, which consisted of a painting, or caricature, of an obscene or defamatory

¹ Tab. VII.² *D.* XLVII. 10. 1. 2.³ *Id.* 15. 1.⁴ *Id.* 15. 20.⁵ *Gai.* III. 224.⁶ *Id.* 11.⁷ *Id.* 15. 16.⁸ *Id.* 15. 5.

nature. In all cases where the character of another was assailed, the truth of the allegation was a sufficient defence to an action, the rule being, *Eum qui nocentem infamavit non esse bonum æquum ob eam rem condemnari. Peccata enim nocentium nota esse et oportere, et expedire*¹. Such being *damnum absque injuria*.

CHAP.
I.

The Prætorian remedy not having been considered sufficient to restrain the commission of injuries, the Lex Cornelia *de injuriis* was passed, it is supposed, by L. Cornelius Sulla, the Dictator, about the year u.c. 672, by which an action lay against those *qui aliquem pulsassent, vel verberassent, vel domum alienam vi introissent*², the *directarii*, who entered houses secretly for the purpose of robbery, *qui in aliena cænacula se dirigunt furandi animo*³. This law took cognizance of every injury occasioned by force⁴; and gave a civil action also in the case of a libel, and rendered the author *intestabilis*; incapable of being a witness, or of making a will⁵. The difference between verberation and pulsation was, that the former was *cum dolore*, where suffering was inflicted, the latter was *sine dolore*, where the act was done *ignominie causa*. The punishment by the Lex Cornelia was banishment, or condemnation, *ad metalla*, or, *in opus publicum*⁶. The prætorian action must be brought within the year, but the civil action under the Lex Cornelia might be brought for thirty years, and the criminal for twenty; and the plaintiff had his choice whether he would proceed civilly or criminally⁷. These actions did not lie for or against the heir, because *actio personalis moritur cum persona*; and *ex delicto defuncti heres non tenetur*.

Lex Cornelia.

Verberation.

Pulsation.

Punishment.

¹ D. XLVII. 10. 18.

² Id. 5. and Hein. Ant. IV. 4. 8.

³ D. XLVII. 11. 7.

⁴ D. XLVII. 10. 5.

⁵ Id. 5. 9.

⁶ Paul. R. S. v. 4. 8.

⁷ Hein. Ant. IV. 4. 10.

CHAPTER II.

Obligations quasi ex Delicto.

BOOK
IV.

Quasi delicta.
Definition.

Erroneous decision of judge.

Things thrown or poured from a house:

QUASI delicta are defined as *facta illicita sola culpa sine dolo admissa*¹; unlawful acts committed carelessly without any evil intent.

Four cases are mentioned in the *Institutes*²:

1. An erroneous sentence given by a Judge.
2. Things thrown or poured from a house.
3. Things hung or placed so as to be dangerous to those who passed under.
4. Things damaged or stolen in a ship or inn.

1. Si judex litem suam fecerit, that is, if by his *imperitia*, which was equivalent to *culpa*, a judge gave a wrong decision, he made himself liable *quasi ex maleficio*, and was amenable to such a fine (*multa*) as met the justice of the case³; but if he acted *dolo malo*, in which case it was *verum delictum*, he was bound to pay all costs of suit⁴. It is probable, as Dr Colquhoun remarks, that penalties were not enforced against judges, unless where their errors were very glaring, since in a manifestly wrong judgment the suitor might have redress by the *restitutio in integrum*.

2. Things *dejecta vel effusa*, thrown or poured from a house where there was a public thoroughfare, and so likely to occasion damage to those who passed, constituted a *quasi delictum*, the remedy for which was provided by the Prætor's Edict⁵; the material words of which are, *in eum locum quo vulgo iter fiet, vel in quo consistetur dejectum, vel effusum quid erit*. It mattered not whether it were a public or private foot-way, or place of

¹ Hein. *El.* 1112.

² *I.* IV. 5.

³ *D. L.* 13. 6.

⁴ *C.* VII. 49. 2.

⁵ *D.* IX. 3. 1.

resort, the object being to protect all who had a right of passage from danger or annoyance. The Edict included all cases where things were thrown from the upper windows of a house by the inhabitant¹. If several persons occupied the room in common from which the things were thrown, the action might be brought against each²; but if the room were divided, the action lay against him only from whose window the things were thrown³. The penalty was double the damage, to be paid by the inhabitant. If a *liber homo* were killed, the penalty was 50 *aurei*, if only wounded, Gaius says, he was entitled to all his expenses, including the bill of his medical attendant, and his loss of time⁴.

CHAP.
II.

who liable.

Penalty.

3. When things were hung or placed in such a way as to be dangerous to those who passed under them, the owner was punishable by fine, whether any one were hurt by their fall or not⁵. The Prætor here imposes a fine of 10 *solidi* upon those who placed or suspended things from the roof or eaves of a house or other building, *qua vulgo inter fiet sive quo consistetur*:

Things
suspended.

It was not necessary that damage should be absolutely done, it was enough if it were likely to happen. The words of the Edict are *cujus casus nocere possit*, which, Ulpian considers, involved every case where there was a possibility of damage from the things so placed or suspended. Unless that were so it was no case of *damnum infectum*, and the Edict did not apply⁶. The accidental falling of a shopkeeper's sign-board from the wall, or of a cask while being slung up, did not come within the Edict⁷.

Penalty.

4. Ait Prætor *nautæ, caupones, stabularii quod cujusque saluum fore receperint, nisi restituant in eos judicium dabo*. The Prætor here provides against the loss of property whilst in the hands of

Nautæ cau-
pones et
stabularii.

¹ D. IX. 3. 1. 4.

² Id. 1. 10.

³ Id. 5.

⁴ D. IX. 3. 7.

⁵ D. IX. 3. 5. 6.

⁶ Id. 5. 11.

⁷ Id. 5. 12.

BOOK
IV.

carriers by water and inn-keepers; for, as Ulpian observes, we are not to take the term *nauta* in the sense of a common sailor, *nautam accipere debemus eum qui navem exercet*¹; he who has the management of a ship as a carrier by water, is answerable *quasi ex delicto* for the acts of his *nautæ*, common sailors and others, if property committed to his care be stolen or destroyed. The *caupo* and *stabularius*, the inn-keeper and stable-keeper are respectively liable for the acts of their servants in the safe custody of the property belonging to those who stop at their houses; for though they are no more liable primarily for *custodia* than the *fullo* or *sarcinator*, still they are held responsible for the acts of their servants if property be stolen or damaged whilst in their possession². Ulpian is of opinion that the property need not be specially assigned, but if put on board the vessel this would be enough to charge the *exercitor*³; and the same inference may be drawn as to the *caupo* and *stabularius*; but he remarks, that if the *exercitor prædixerit* had duly given notice that he would not be answerable for the property on board his ship, and the owner agreed to it, *consenserit prædictioni*, he had no remedy against the *exercitor* if the property were lost.

Importance
of the Edict.

Ulpian discusses the reason and necessity for this Edict⁴, because a civil action would lie against these carriers and inn-keepers in various ways: First, the *actio furti ex vero delicto*; but in such case it would be necessary to prove that the owner or landlord himself had been guilty of the offence. Secondly, the *actio ex locato vel conducto*; but here it is essential to prove *culpa*. Thirdly, the *actio depositi* would not lie unless the reception of the property were gratuitous, and then you must prove *dolus*. Fourthly, the *actio de recepto* would lie, because having received the property, the re-

¹ D. IV. 9. 1. 2.² D. IV. 9. 1. 8.³ D. IV. 9. 5.⁴ *Id.* 3. 1.

ceiver thereby became answerable for the safe custody¹; but in all these cases *dolus*, or *culpa*, must be proved against the carrier, or the inn-keeper *himself*. Consequently the Prætor established the *actio quasi ex delicto*, in which case it was only necessary to prove the reception of the property, and the subsequent loss or damage; the master being thus made liable for the acts of his servants.

The pleas in answer to this action are either the *culpa* of the plaintiff, or *damnum fatale*².

CHAP.
II.

¹ D. IV. 9. 3. 2.

² I. III. 1.

CHAPTER III.

Actions.

BOOK
IV.

IN case of privation or infringement of a man's right, the *jus civile* of each particular society entitles the injured party to redress; and the means by which redress is to be obtained are suits or actions in a Court of Justice.

Actio: definition.

*Actio nihil aliud est quam jus persecuendi judicio quod sibi debetur*¹; the means which the law puts into a man's power of pursuing and recovering those rights, whether perfect or imperfect, of which he is unjustly deprived. But the word *actio* has a double signification. In its primary sense it means the *jus persecuendi*, the *right* of recovery: in its secondary, the *modus persecuendi*, the forms necessary to accomplish the recovery.

Double signification.

Actions, how classed.

Actions are divided into two classes, real and personal²; to which may be added a third class, called mixed actions³; the first, where some specific thing is claimed, and sought to be recovered; the second, where the plaintiff declares the defendant is bound upon some obligation *dare, facere* or *præstare*; and the third, where the plaintiff claims his property, and a penalty besides⁴.

Before we enter upon the examination of actions, it will be convenient to premise a few observations upon the courts in which they were brought, and those magistrates who were invested with the power of administering justice. The earliest period of the Roman Commonwealth in this particular is involved in great obscurity, the

¹ *I. IV. 6.*

² *Id. 6.*

³ *Gai. IV. 1.*

⁴ *I. IV. 6. 18.*

minute investigation of which would ill repay the labour of the law student. CHAP. III.

Justice was at first administered by the kings in person¹: *Omnia manu a regibus gubernabantur*². Servius Tullius, the sixth king of Rome, established a particular tribunal for private suits³. On the establishment of the republic the authority of the kings passed to the consuls⁴, who at first performed the office which afterwards devolved upon the Prætor⁵. These magistrates received assistance in their functions in two ways,—first, from the centumviral court, which was a permanent tribunal; and, secondly, from the judges they themselves deputed to try particular causes⁶. Adminis-
tration of
justice in
the earliest
period.

The jurisdiction of the centumviral court appears to have extended to all questions of private property⁷. The court is supposed to have consisted of 105, three from each of the 35 tribes. When it sat for business a spear was set up as the emblem of its authority in all quiritarian rights⁸. Under the empire its number became 180⁹. It sat in the Basilica Julia, and was divided into four *consilia*, which formed separate tribunals; but some questions were tried before the whole body¹⁰. The Prætor with the *Decemviri litibus judicandis* presided¹¹. Centumvi-
ral court.

The *Decemviri litibus judicandis* formed a permanent court. Pomponius says, *Cum esset necessarius magistratus qui hastæ præesset Decemviri stlitibus judicandis sunt constituti*¹². Of their authority nothing more is known than that they were appointed to settle matters of freedom¹³. Decemviri
litibus
judicandis.

The *Judex* was an officer appointed by the Prætor, datus a Prætore, whose province was to preside at the trial of matters of fact. He was

¹ Cicero, *de Rep.* v. 2.

² *D. I.* 2. 1.

³ Cicero, *de Rep.* v. 2.

⁴ Liv. II. 57.

⁵ Liv. III. 55.

⁶ Colq. 232.

⁷ Cic. *de Orat.* I. 38.

⁸ Gai. IV. 16.

⁹ Plin. *Ep.* VI. 33.

¹⁰ Colq. 232.

¹¹ Hein. *Ant.* IV. 6. 9.

¹² *D. I.* 2. 2. 29.

¹³ Colq. 1993.

BOOK
IV.*Judex
pedaneus.**How ap-
pointed.**Arbiter.**Recupera-
tores.*

also called *judex pedaneus*, because he sat *quasi ad pedes Prætoris*.

The question as to how the selection of the *Judices* for the trial of causes was made, it is impossible to answer: any attempt to do so must fail, for we find between the year U.C. 605, the date of the *Lex Calpurnia*, which was the origin of the *Quæstiones perpetuæ*, and the year 729, no less than ten *leges judiciariæ* were passed. The *Lex Aurelia*, passed A.U.C. 684, appears to have established three *decuriæ judicum*, consisting of the Senate, the Equites and the Tribunes. The *Lex Julia*, A.U.C. 708, excluded the Tribunes; and the *Lex Antonia*, two years afterwards, A.U.C. 710, restored them again¹. There was, no doubt, an *Album judicum*, from which the Prætor selected the *judices*: further than this nothing has been ascertained with certainty.

The *Arbiter* was a judge of a *res incerta*, where an amount was to be assessed in cases *bonæ fidei*. He had the assessment of the value, the *judex* being rather confined to a *res certa*. *Judices* in the plural were only summoned in criminal cases, their duty being very different from that of the *Judex*, inasmuch as it resembled that of the English Jury, their verdict being the opinion of the majority. The Prætor sat as judge, and gave judgment, if they convicted.

Recuperatores were named by the Prætor to assess damages and determine matters of fact generally. Instead of *judex esto*, the Prætor declared *Recuperatores sunt*²; and the distinction between these and a single judge consisted in their plurality; and they were appointed whenever a *peregrinus* was a party to the suit, or where the cause was tried more than a mile from Rome³. Dr Colquhoun discusses their probable duties, but with no certain or definite conclusion⁴.

¹ The reader is referred to Haub. Vol. II. pp. 39 to 47.

² Gai. IV. 46.

³ Gai. IV. 105.

⁴ Colq. 1996.

It is not until the year U.C. 387, when the office of Prætor was created, that we begin to see a regularly defined court of judicature, and system of legal process¹. The Prætor was invested with the prerogatives of *imperium* and *jurisdictio*, the former of which consisted of the power of summoning parties to his court, the *in jus vocatio*; the latter in the *jus edicendi*, whereby he first ascertained whether there was a cause of action; and if so, he sent it down to be tried by a *judex*, whose duty was set forth in a formula of this nature, *Si paret condemna, si non paret absolve*². This was to decide an issue of fact, and was said to be *secundum ordinem*. If no fact were disputed, and the Prætor decided at once on a point of law, it was said to be *extra ordinem*. His *jus edicendi* also applied to his power of changing and modifying the *album* at his discretion, which produced such remarkable results to the Roman jurisprudence³.

The place where the Prætor sat in public to hear causes was called the *Tribunal*, which was an elevated seat in the Forum where he occupied a *sella curulis*⁴. He also administered justice out of court, which was called *de plano*⁵, i. e. at his house, or even in the street: the latter case being analogous to what with us is called a Judge "at Chambers." The Prætor might delegate his authority, *mandare jurisdictionem*⁶, to a deputy, either wholly or in part; but the inferior magistrates were not invested with *imperium*. The *imperium* granted to the superior magistrates in civil cases did not necessarily include authority in criminal matters, which was called *imperium merum*, and was equivalent to *potestas*: if both were conferred, it was called *mixtum*⁷.

¹ Book I. chap. 2.

² Book I. chap. 2.

³ *Id.* 8.

⁴ Gai. IV. 86.

⁵ Hein. *Ant.* IV. 6. 7.

⁶ *D.* II. 1. 16.

⁷ *D.* II. 1. 3.

CHAP.
III.

Prætor.
His
powers.

Secundum,
or extra
ordinem.

Tribunal.

De plano.

Imperium
merum and
mixtum.

BOOK
IV.*Judicium.
Legitimum
and sub
imperio.*

A distinction was drawn between a *judicium legitimum* and a *judicium sub imperio*: the former was where the decision took place in Rome, or within a mile of the city, and in which none but Roman citizens were concerned; the latter where a *peregrinus* was a party to the suit, or where the cause was tried more than a mile from Rome¹. The right of action in the former was limited to a year and a half by the *Lex Julia judiciaria*: the latter could not be longer than a year, because it ceased with the office of the Prætor who granted the action.

Consilium.

When the Prætor sat for the despatch of business, he had in attendance his *consilium*, who sat behind him and assisted with their advice. In Rome the *consilium* was composed of five senators and five equites. These were the *Decemviri litibus judicandis* mentioned by Pomponius². In the provinces the *consilium* consisted of twenty *recuperatores*, Roman citizens³.

I have now mentioned the various public functionaries who were in their several ways concerned in the administration of justice in actions now to be considered. Should the time of the reader suffice, or his curiosity prompt him to make a deeper research into their origin and duties, he may consult Heineccius' *Antiquities*, Book iv. and Dr Colquhoun's *Summary*, under the different titles and authorities there cited, but he must often begin with assumptions, and end with probabilities. In considering the early forms of legal process, the knowledge of which we derive from the *Institutes* of Gaius, it is impossible to adhere to the arrangement of Dr Hallifax.

*Legis
actiones.**Five in
number.*

We have already seen, that when the laws of the Twelve Tables came into operation, the *Legis actiones* were the necessary result⁴. Of these, Gaius informs us, there were five: *Lege agebatur*

¹ Gai. iv. 185.² Ulp. *Frag.* i. 13.³ D. i. 2. 2. 29.⁴ *Ante*, Book i. chap. i.

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IV.

If the property were such as could not be produced in court, as land, a house, or a flock of sheep; a clod, or brick, or a fleece of wool, answered the purpose¹.

*Per postulationem
judicis.*

2. *Per postulationem judicis.* The page containing the description of this action in the manuscript of Gaius is lost, we are therefore entirely left to conjecture; but from the title we may safely conclude that the parties appeared before the Prætor, and having joined issue upon the facts, a judge was appointed to try the case.

*Per con-
dictionem.*

3. *Per conductionem.* The early part of the manuscript of Gaius on this *legis actio* is also lost. He tells us, however, that it was introduced by the *Lex Silia* for the recovery of *certa pecunia*, a specific sum of money, and that it was afterwards extended by the *Lex Calpurnia*, A.U.C. 606², to actions *de omni certa re*³. The plaintiff summoned the defendant to nominate a *judex* within thirty days; but Gaius remarks that the term *condictio* was a misnomer in his time.

*Per manus
injectionem.**Form of.*

4. *Per manus injectionem.* This was originally nothing more than the arrest of the defendant by the plaintiff *pro judicato*, for a judgment debt. The form was this: Since a judgment has been given against you in my favour for *decem millia*, which you have not paid, I therefore arrest you for that sum⁴. Upon which the defendant was obliged to give bail, and if he did not he was taken home by the plaintiff in custody; which placed him under the necessity of paying the sum demanded or of remaining in custody. This *legis actio* was afterwards extended to cases where money had become due by the force of certain laws, e.g. by the *Lex Publilia*, when the sponsor had paid money for his principal, if it were not repaid in six months he might arrest him. Also by the *Lex Furia de Sponsu*⁵, where more than the *pars*

¹ Gai. IV. 17.² Gai. IV. 19.³ Haub. II. 39.⁴ Gai. IV. 21.⁵ Gai. III. 121.

virilis had been exacted from a sponsor it could be recovered by arrest, and so in many other cases; but it was afterwards settled that where the *manus injectio*, the arrest, was neither *pro judicato*, for a judgment debt, nor *pro depenso*, for money paid for the defendant, he could not be kept in custody if he agreed to appear to the action.

CHAP.
III.

5. *Pignoris captio*. This is the fifth *legis actio* which Gaius says rested partly on custom and partly on law¹. That founded on custom was military. A soldier could distrain upon the goods of the paymaster if his pay was in arrear,—for his *æs militare*, or for the allowance to which he was entitled for the purchase of his horse, *æs equestre*; or for his allowance to provide provender for his horse, *æs hordiarium*.

Pignoris captio
founded on
custom
and law.

This form of action was also introduced by the law of the Twelve Tables² against him who had bought a victim for sacrifice, and had not paid for it; also against one who had hired a beast of burden, and had not paid the hire, where the owner declared he let it for the purpose of expending the money *in dapem*—in sacrifices³. Also by a law, the name of which is obliterated in the text of Gaius, the power of distraint was allowed to the *publicani* for the payment of taxes in arrear.

This *legis actio*, the distraint, must be accompanied *certis verbis*. It need not be in the presence of the Prætor, nor need the defendant be present; and it might be *nefasto die*⁴.

Objections
to the *Legis*
actiones.

These *legis actiones*, as we have before observed, were all founded upon the Twelve Tables; they were framed in the most narrow spirit, and became inconsistent with the progressive develop-

¹ Gai. iv. 26, 27.

² *Id.* 28.

³ This clearly involves a fiction like that used formerly by suitors in the Court of Exchequer, which took no notice of private suits unless the suitor declared he was unable to pay his taxes, which immediately made it a revenue case.

⁴ Gai. iv. 28—29.

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ment of the *jus civile*, and still more opposed to the equitable principles of the Prætor's court. Hence, as Gaius remarks, *Paulatim in odium venerunt*¹; and he gives a striking example in the case of a man who brought his action *de vitibus succisis*, where some one had cut up his vines. On reference to the law on which his action was founded, the word was *arbores*. It was argued that he should have sued *de arboribus succisis*, and therefore he was non-suited². By this extreme stringency in enforcing adherence to the letter of the law, no discretion being allowed to the Judge before whom the case was tried, parties when in court were defeated on matters of form without any regard to the merits of the case; it therefore became impossible for this state of things to continue when the law itself was rapidly becoming more enlarged in its principles.

Their abolition.

The first blow aimed at the *legis actiones* was by the *Lex Æbutia*, of which, and of the date of its enactment, nothing is known; but they were not entirely superseded until the two *leges Juliae* were passed; and then the *legis actio* was reserved in two cases, viz. *damni infecti*, and in the *centumvirale judicium*³. Here begins what is called the Formulary Process, which we will proceed to examine, together with the proceedings in an action, in the next chapter⁴.

¹ Gai. iv. 30.

² *Id.* 11.

³ *Id.* 30, 31.

⁴ The reader may here consult with advantage the historical sketch of *Legal Procedure among the Romans*, by Dr Abdy.

CHAPTER IV.

Proceedings in an Action.

JUDICIUM, or trial, is a legal debate on a matter of controversy before a competent judge. Judgments in the Roman law were, 1. Private. 2. Public. Private judgments were those which related to civil causes in order to redress an injury as it affected an individual; and were prosecuted by action, which could only be instituted by the injured party.

CHAP.
IV.

Judicium.
Private
and public.

A court is a place where justice is judicially administered, and to constitute a court three persons at least are necessary, the *actor*, the *reus*, and the *judex*; the plaintiff, the defendant, and the judge.

A Court.

The constituent parts of a civil action are as follows: 1. *Vocatio in jus*. 2. *Postulatio et editio actionis*. 3. *Vadimonium*. 4. *Intentio litis sive actionis*. 5. *Exceptio rei*. 6. *Datio judicis*. 7. *Satisfactiones actoris et rei*. 8. *Contestatio litis*. 9. Oaths of the judge and litigants. 10. Proofs. 11. *Disceptatio causæ*. 12. Sentence. 13. Execution. 14. Appeal.

Constituent
parts of a
civil
action.

1. *Vocatio in jus*. This was done by the plaintiff himself, who summoned the defendant into court by addressing him thus: *In jus eamus*, or *In jus veni*, or *Sequere ad tribunal*. If the defendant refused to comply, the plaintiff then called on any bystander to attest that fact, saying, *Licet antestari?* If the party agreed, he touched his ear, saying, *Memento*. This was to justify his next proceeding, viz. dragging the defendant into court by force, which he was allowed to do by the law of the Twelve Tables, which runs as follows: *Si in*

*Vocatio in
Jus.*

*Powers of
the Reus.*

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IV.

*jus vocat, ni it, antestator: Si calvitur pedemve struit, manum endo jacito, si morbus evitasve vitium escit, qui in jus vocabit jumentum dato, si nolet arceram ne sternito*¹. If the defendant then refused to go, he might take him by force; if he were sick, or too old to walk, he might put him on the back of a beast; if unable to ride, he might put him into a covered waggon (*arceram*), and so convey him to court.

If the party were a thief, or of infamous character, this ceremony was unnecessary.

These
powers
restricted.

Subsequently the rigour of the Twelve Tables was modified, and it became necessary to obtain the permission of the Prætor before certain persons could be brought into court². No one could be forceably taken from his house³; nor could sick persons be carried into court⁴. The defendant might here make an arrangement (*compositio*) with the plaintiff, and settle the cause of dispute: if this were not done, he must obtain a *vindex*, some one of sufficient responsibility to answer for his appearance, and who must pay the demand of the plaintiff if the defendant were a defaulter.

Vindex.

*Postulatio
et editio
actionis.*

If the action proceeded, the next step was, 2. *Postulatio et editio actionis*, the demanding an action, or permission to sue, and the statement of the ground of action, which was done by the plaintiff's advocate, if he had one, and if not, the Prætor assigned him one⁵. If the Prætor granted the petition to sue, the plaintiff was said *edere actionem*, which was explaining to the defendant the particular action on the *album* upon which he meant to rely. If he made a mistake in the amount of his claim, or the form of the action, a nonsuit was the consequence.

The next thing was to secure the attendance of

¹ The reader will find a well-arranged copy of the 12 Tables in the synoptical edition of the *Institutes of Gaius and Justinian*, by Gneist.

² *D.* II. 4. 4.

³ *Id.* 21.

⁴ *D.* II. 5. 2. 1.

⁵ *D.* III. 1. 1. 4.

the defendant at the trial, and this was done by making him give bail, *vades*, which was therefore called, 3. *Vadimonium*, and which consisted in one or more persons entering into an undertaking that the defendant should appear at the time fixed, the *dies perendinus*, the third day. This being done, it was called *Vadimonium conceptum*¹.

4. *Intentio litis sive actionis* was the preferring of the suit or action, in a certain form of words by the *actor* on his own appearance, and that of the *reus*, before the *Prætor*.

On the adjourned day the *Prætor* ordered the parties to be called upon in court that he might hear the case and appoint a judge to try the issue. If the *reus* appeared, he was said *vadimonium sistere*, and thereupon his bail was discharged. If he did not appear, he was said *vadimonium deservisse*, and the *Prætor* granted the *immissio in bona*, a d restraint upon his goods, as allowing judgment to go by default; but if there were any defect in the proceedings the *reus* might obtain a *restitutio in integrum* by application to the *Prætor*². If the *actor* failed to appear he was non-suited.

If the pleadings were not finished in the day the *reus* was obliged again to give bail for his appearance on the day of adjournment³.

Both parties being present in court, the *reus* called upon the *actor*, saying, *Quid ais?* The *actor* then made his claim in a fixed form, e.g. *Aio fundum quem possides meum esse*, or *Aio te mihi dare facere oportere*, as the case might be⁴.

To this succeeded, 5. *Exceptio rei*, the plea of the defendant. The *reus* made his *exceptio*, put in his plea, which was either peremptory or dilatory, as an answer to the *intentio*, the declaration, of the *actor*, which the latter might oppose by what was called a *replicatio*; and this again might be answered by the *reus* by a *duplicatio*, and so on till

¹ Hein. *Ant.* iv. 6. 19.

² *D.* iv. 1. 7.

³ Gai. iv. 184—5.

⁴ Hein. *Ant.* iv. 6. 22.

BOOK
IV.*Datio
judicis.**In jure.**In judicio.*

issue was joined, which was when the parties had reduced the matter in contention to a simple positive and negative, *similiter ego te*. Having arrived at this point in the proceedings, the next step was, 6. *Datio judicis*, the appointment of a judge by the Prætor to try the facts of the case as set forth in the pleadings which had taken place before him. The case thus far was said to be *in jure*; and either party could amend their declaration or pleadings up to this point, and before the *litis contestatio*, i. e. before the trial began¹. As soon as the case was in the hands of the *judex*, it was said to be *in judicio*.

We must now examine the *formula* which the Prætor drew up, founded upon the pleadings which had taken place before him. This contained the appointment of the judge, stated the ground of action, and prescribed the duty of the judge.

*Formula
consisted of
four parts.*

This *formula* was substituted for the old *Legis actio*, and consisted of four parts: the *demonstratio*, the *intentio*, the *adjudicatio*, and the *condemnatio*².

*Demon-
stratio.**Præscrip-
tio, what.*

The *demonstratio* set forth the subject of the suit, thus, *Quod Aulus Agerius Numerio Negidio hominem vendidit*; the sale of a slave. Or, *Apud Numerium Negidium hominem deposuit*; the deposit of a slave. This preceded the *intentio*, the declaration, as we should call it in the English law, but the *intentio* was sometimes preceded by what Gaius calls a *præscriptio*, which, from the nature of the demand, was used by way of precaution, lest, by incautiously enforcing what was due, the *actor* might preclude himself from that which was not yet demandable, and yet was part of the agreement. Gaius gives us the example, where so much money was agreed to be paid by monthly or yearly payments. That which was due might be demanded, but to preserve the right of suing afterwards for that which was accruing, it

¹ D. IX. 4. 4. 3.² Gai. IV. 39.

was necessary to use this *præscriptio*, *Ea res agatur cujus rei dies fuit*, i. e. let the action be brought for so much as may be found due. This kept it open to the actor to sue when the rest was due, otherwise the reus might plead *res judicata*¹, and the actor would be *summatus*, non-suited². It was called *præscriptio* because it was the preface to the formula.

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IV.

The *intentio* was that part of the formula in which the actor *desiderium suum concludit*, containing the question of fact, or of law, or of both, as the case might be, and was the essential part of the action, e. g. *Si paret Numerium Negidium Aulo Agerio sestertium x. millia dare oportere*. Here Aulus Agerius, the actor, or plaintiff, sues Numerius Negidius, the reus or defendant, for x. millia sestertium, which he declares he owes him. Or, *Si paret hominem ex jure Quiritium Auli Agerii esse*: here he declares for a slave which Numerius Negidius detains from him³.

The *adjudicatio* was that part of the formula which empowered the judge to adjudicate as in questions between coheirs, or partners, or the owners of adjacent estates, and ran thus: *Quantum adjudicari oportet, judex Titio adjudicato*⁴.

The *condemnatio* was the concluding part of the formula, and gave the judge the power of condemning or acquitting, or more properly speaking, of adjudicating for or against the actor, thus, *Judex Numerium Negidium Aulo Agerio sestertium decem millia condemna, si non paret absolve*. Sometimes the *intentio* stood alone as in the *præjudiciales formulæ*, but there could be no *condemnatio* without an *intentio* or *demonstratio*⁵.

These formulæ were either *in jus* or *in factum* *conceptæ*, and Gaius gives examples of each⁶. The formula *in factum concepta* runs thus: *Judex esto*.

¹ Gai. IV. 121.

² *Id.* 42.

³ *Id.* 44.

⁴ *Id.* 130.

⁵ *Id.* 44.

⁶ *Id.* 47.

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Si paret Aulum Agerium apud Numerium Negidium mensam argenteam deposuisse eamque dolo malo Numerii Negidii Aulo Agerio redditum non esse, quanti ea res erit tantam pecuniam judex Numerium Negidium Aulo Agerio condemnato. Si non paret absolvito. Here the *judex* must first find the fact of the *depositum*, which was an issue caused by the denial of that fact by the *reus* in his *exceptio*; secondly, the fact of the fraudulent retention; and, if the *actor* made out his case thus far to the satisfaction of the *judex*, then he had to decide what amount of damages he was entitled to.

The formula *in jus concepta* was thus: *Judex esto. Quod Aulus Agerius apud Numerium Negidium mensam argenteam deposuit, qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona, ejus judex Numerium Negidium Aulo Agerio condemnato, nisi restituat. Si non paret, absolvito.* Here the two facts of the deposit, and the wrongful detention are admitted, because the *reus* did not deny them by his *exceptio* before the *Prætor*; the only question therefore to be decided by the *judex*, is how much Aulus Agerius is entitled to *ex jure quiritium* for such detention. The formula *in jus concepta* necessarily involved facts as well.

The *condemnatio* was always framed with a view to the pecuniary value: *Judex æstimata re pecuniam eum condemnat*¹; and this according to the formula was either a fixed sum laid in the *intentio* by the *actor*, or it was left to the *judex* to assess the *quantum* of damages. In the first case it was thus: *Ejus judex Numerium Negidium Aulo Agerio duntaxat decem millia condemna. Si non paret absolve.* Therefore where a specific sum of money was alleged to be due he must find that sum, or nothing; or where a specific value (*taxatio*) was attached to the things claimed he could not exceed that sum, but he might award less if the

Sum to be awarded either stated in the *intentio*, or to be found by the *Judex*.

¹ Gai. IV. 48.

circumstances warranted it. In case of a *res incerta*, the formula ran thus: *Quanti ea res erit tantam pecuniam judex Numerium Negidium Aulo Agerio condemna. Si non paret absolvito*¹. Here it was left to the *judex* to assess the damages upon the evidence before him. If the *actor* claimed more in his *intentio* than he ought, he was non-suited, nor could he get a new trial except in some cases where the *Prætor* allowed it².

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Thus far as to the formulary process where the action was *directa*. But as many persons might have a right of action, though not *stricti juris*, the *Prætor* sanctioned a formula which gave to such parties an *actio utilis*³. This was done by a fiction, e.g. where the *bonorum possessio* had been granted it might become necessary to bring an action to obtain possession; but the *bonorum possessor* could not in his *intentio* declare as *heres*, for the law could only make an heir; therefore since he could not assert that the property of the deceased *suum esse ex jure quiritium*, he was obliged to proceed *ficto se herede*, in which case the formula directed to the judge ran thus: *Judex esto. Si Aulus Agerius (the bonorum possessor) Lucio Titio heres esset, tum si paret fundum de quo agitur ex jure quiritium ejus esse oportere, &c.* So if the action were in *personam* the formula was thus: *Tum si paret Numerium Negidium (a debtor of the deceased) Aulo Agerio (the bonorum possessor) sextertium decem millia dare oportere*⁴, &c. Also an action might be brought by or against a *peregrinus*, upon the fiction that he was a *civis Romanus*⁵. Also, if one had been *capite diminutus*, the formula was framed as though he were not so⁶. Gaius mentions other cases, which will be noticed in the next chapter, when considering the different kinds of action.

Actio utilis.

Case of a Peregrinus,

or capite diminutus.

¹ Gai. iv. 51.

² See post, chap. 5.

³ *Id.* 37.

⁴ *Id.* 53.

⁵ Gai. iv. 34.

⁶ *Id.* 38.

BOOK
IV.*Satisfactio
of reus.**Actor
and pro-
curator.*

Before the *Litis contestatio*, the (7) *Satisfactiones actoris et rei* were required, which was for the purpose of enforcing execution of the judgment. In an *actio in rem* the possessor of the disputed property was obliged to give security, that if the judgment were against him, and he should neither deliver over the property recovered, nor pay the costs of the suit, the *actor* should have a right of action against him or his sureties. This security was called *judicatum solvi*¹; and if he did not besides give security for the safe custody of the property in dispute, it was forthwith handed over to the *actor*; but should he refuse to give the like security, it then remained with the *reus*, because *in pari causa potior est possessor*². This was done by a stipulation³. The procurator of the *actor* was obliged to give security *rem ratam dominum habiturum*.

In a personal action the *actor* was not required to give security, nor the *reus* if he appeared in person, but security was demanded of the procurators of both parties⁴. But this rule was afterwards relaxed⁵.

*Litis con-
testatio.*

8. *Litis contestatio*. This corresponds with what in the English law is called the *record*; the whole of the proceedings *in jure*, the oral pleadings before the Prætor, upon which the parties had joined issue, and agreed to accept the decision of a *judex pedaneus*. But before proceeding to trial the (9) oaths of the judge and the litigants were required.

*Oaths of
the Judge
and liti-
gants.*

The oath of the *judex* was, that he would decide on the merits of the case *ex animi sententia*: that of the litigants was the oath of calumny, in which they reciprocally swore they did not maintain or defend the cause in hand, *calumniæ causa*, from bad feeling or mere chicanery⁶; but the oath

¹ *I. IV. 11.*² *Ulp. Frag. I. 11.*³ *Hein. Ant. IV. 11. 2.*⁴ *I. IV. 11. 1.*⁵ *Id. 2.*⁶ *Gai. IV. 171—181. De poena temere litigantium.*

was not always taken unless the opposite party desired it¹. CHAP.
IV.

10. Proofs. The evidence in trials among the Romans, as at the present day, was oral and documentary. No one could be called on to prove a negative, and therefore the burden of proof lay, as a general rule, with the *actor*. The competency of witnesses was determined by rules, if not identical, yet analogous to, those which govern modern courts of justice. The reader may consult the *Digest*, Book 22, and Titles 3, 4 and 5. Proofs.

11. *Disceptatio causæ*, the trial of the cause before the *judeæ*. This consisted of two parts: Disceptatio
causæ.
1. *Conjectio causæ*. 2. *Peroratio*. Of the *conjectio causæ*, Gaius says, *Antequam apud eum (judicem) causam perorarent solebant breviter ei et quasi per indicem rem exponere: quæ dicebatur causæ collectio, quasi causæ suæ in breve coactio*. Then came the *peroratio*, which was the speech of each of the advocates, and then they proceeded to examine their witnesses. Here the duty of the judge began. He was bound to see that the facts were duly proved by legal evidence. Conjectio
causæ. Peroratio.

Probatio was said to be *plena* when supported by two witnesses², or by an instrument of public authority³. One witness, or a private instrument, constituted *probatio semiplena*. Probatio.

Certain persons were incompetent as witnesses. No one could give testimony in civil cases under fourteen years of age⁴, nor in criminal cases under twenty-five years of age⁵. Witnesses might be rejected by reason of influence⁶, and relationship⁷. They were entitled to their expenses according to their rank and position, which the judge might order to be paid⁸. Competency of
witnesses.

¹ D. XXXIX. 1. 5. 14.

² D. XXII. 5. 12; and C. IV. 20. 9. 1.

³ C. IV. 19. 5. 6. 7.

⁴ Id. 20.

⁵ Id. 4.

⁶ D. XXII. 5. 19.

⁷ Id. 6.

⁸ C. IV. 20. 11.

BOOK 12. Lastly followed judgment and (13) execu-
 IV. tion. In delivering judgment the *judez* pronounced
 Judgment. a *condemnatio*, which was a verdict for the *actor*,
 or an *absolutio*, which was a verdict for the *reus*, or
 a *non-liquet*, which was a nonsuit, and thereupon a
 new trial might be had, there being no decision,
 and therefore the plea of *res judicata* would not
 avail the *reus*.

Execution. Under the *Legis actiones*, we have seen that
 execution was effected by the *manus injectio pro
 judicato*. Afterwards the Prætor assisted the cre-
 ditor by his decree if the debtor failed to obey the
 sentence within the legal period. The creditor
 was *missus in possessionem bonorum*, and then pro-
 tected from all disturbance by the Prætor¹, with
 the power of sale².

Appeal. 14. *Appellatio*, the appeal, was during the re-
 public to another Prætor³, or to the Consul, or to
 the Tribunes, afterwards to the Emperor. The
 reader may consult on this head *D.* 49, from Title
 1 to 8 inclusive.

If the ground of appeal were a denial of the
 right to sue, the Prætor awarded a *restitutio in
 integrum*, if the appellant proved his case.

¹ *D.* XLIII. 4. 1.

² *D.* XLII. 4. 6. 1.

³ *Cic. in Verr.* II. 1. 46.

CHAPTER V.

Real Actions.

Actio Realis	{	1. Rei Vindicatio	}	Ex dominio.	CHAP. V. <i>Real actions.</i>		
		2. Publiciana					
		3. Recissoria					
		4. Confessoria et negatoria, ex	}	servitutibus.			
		5. Hereditatis petitio					
		6. Querela inofficiosi testa- menti	}	Ex hereditate.			
		7. Serviana					
		8. Quasi Serviana	}	Ex jure pignoris.			
		9. Præjudiciales				{	1. Ex liberali causa.	{	1. De libertate. 2. De ingenui- tate.
				2. De partu agnoscendo.			

IN considering the various actions in detail we cannot do better than set out with the short and simple definition of Ulpian : *Actionum genera duo sunt, in rem quæ dicitur vindicatio, et in personam quæ condictio appellatur*¹. All actions are referable to one of these two heads. But before we proceed to examine each particular action in itself it will be convenient to have a clear conception of the different actions as they arose either from law or equity.

In the first place actions were either Civil or Prætorian, the former based upon the strict *jus Civile*, the latter emanating from the *Album* of the Prætor: the former were called *directæ* and *vulgares*²; the latter, *fictitiæ* and *utiles*³, which were in each case one and the same. We have also the actions *stricti juris*, *bonæ fidei*, and *arbitrariæ*. These may be said to be confined entirely to mat-

¹ D. XLIV. 7. 25.

² D. XXVIII. 5. 46.

³ D. XIX. 5. 2; and Gai. IV. 34—38.

*Civil and
Prætorian.

Directa
and vul-
garia.
Fictitia
and utilis.
Stricti
juris.
Bonæ fidei.
Arbitra-
ria.*

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IV.

ters of contract. The first were such as those wherein the plaintiff's claim rested upon the express words of the contract, and to which the judge was strictly confined in his decision: the contract of *mutuum* would be an example. In the second, the judgment might extend to that which was not promised by express words merely, but to all that might be fairly implied in the agreement; and the judge was allowed to adjust the respective claims of the parties to the suit, provided they came within the question before him, such as the set-off of mutual debts¹. The third were tried before the *arbiter*, who appears to have been invested with more extensive powers than the *judex*, amounting to a general settlement of all matters in dispute between the parties².

Having premised thus much, we will proceed to examine briefly the different actions under the head of *actio realis* or *vindicatio*.

*Actions
petitoria
and posses-
soria.*

It must be observed that these actions were classed under two heads, *petitoria* and *possessoria*: the first where the action was brought to obtain possession of that which the plaintiff declared to be his *ex jure quiritium*; the second, for quiet possession, where he had possession, but which was disturbed by the unlawful acts of another.

Rei vindicatio.

1. *Rei Vindicatio*. This was the oldest action with reference to property. The form of it under the *Legis actiones* is described by Gaius³, as well as under the formulary system⁴. The right of vindication was inherent in the *dominium quiritarium*, which is defined as *Jus in re corporali, ex quo facultas de ea disponendi eamque vindicandi nascitur, nisi vel lex, vel conventio, vel testatoris voluntas obsistat*⁵. The action must be brought for the specific thing, for if the value only were claimed, it became a *condictio*, and not a *vindicatio*.

¹ Gai. IV. 63.

² Gai. IV. 16.

³ Fest. *sub voc.*

⁴ *Id.* 41.

⁵ Book II. chap. 1.

Dominium being divisible into *plenum* and *minus plenum*¹, it must be observed that the *vindicatio directa* was only applicable to the former. CHAP.
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Wheresoever, therefore, the *dominium* was *minus plenum* the remedy must be by a *vindicatio utilis*. *Vindicatio directa and utilis.*

The *actor* must sufficiently describe his property, that it may be identified in the hands of the *reus*; nor will the judge inquire the grounds of the possession, it being the business of the *reus* to plead any just claim he may have².

The *actor* is entitled to the thing claimed, with all its *mesne* profits³, but he must indemnify the *bona fide* possessor for any expenses laid out upon it⁴. Dr Colquhoun sums up this action as follows: The *actio rei vindicationis competit domino directe ex dominio pleno, utiliter ex dominio minus pleno contra quemcunque possessorem, vel verum vel falsum in id, quod actor dominus declaretur, eique restitatur cum omni causa, accessionibus, fructibusque pro qualitate possessionis*⁵.

2. *Actio Publiciana*. This was an *actio in rem* introduced by the Prætor for the relief of those who had come lawfully into possession, as by purchase, gift, or legacy, and had lost possession before the time had expired for completing usucapion. In such case there was no *dominium quiritarium*, and therefore no *actio directa ad rem persequendam*: the period of usucapion was therefore supposed to have expired. The Prætor's edict ran thus: *Si quis id quod traditur ex justa causa non a domino, et nondum usumcaptum, petet: judicium dabo*⁶. And Ulpian remarks that the words *ex justa causa* apply to every lawful possession. We must of course assume there has been no *mancipatio*, nor *in jure cessio*. *Actio Publiciana.*

This action will lie for usufructs and services. *For what the action lies.*
In the case of purchase, where delivery is neces-

¹ *Id.*

² *Id.* 17. 1.

³ Colq. 2013.

⁴ *D.* VI. 1. 9.

⁵ *D.* VI. 1. 7.

⁶ *D.* VI. 2. 1.

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sary to complete the contract, the action will not lie where there has been no delivery either to the buyer¹ or some one on his behalf². It follows that the action will not lie for things incapable of usucapion. It extends to heirs and *bonorum possesores*. Lastly, it is a *quasi vindicatio* founded on the equity of giving the thing claimed to him who has the best title to it.

The question, why the *actor* cannot sue the possessor personally, is answered by Gaius³; because the thing being already his, he sues for possession of it, and not for the thing itself; and therefore the form *dare oportere* cannot apply.

Actio Recis-
soria.

3. *Actio Recissoria*. This was an action introduced by the Prætor for the benefit of those who, while being absent on public service, or prisoners of war, some one had obtained possession of their property, and so claimed it on the ground of usucapion. The edict adopting the principle of the *jus postliminii* compelled restitution to the real owner.

Actio Con-
fessoria.

4. The *actio confessoria directa* was an action *in rem*, because it related to the plaintiff's claim to a service, which, though in itself incorporeal, was attached to corporeal property. Thus, where one was disturbed in the enjoyment of a usufruct, or in the case of any rural or urban service, as of his right *itineris*, *actus*, *viæ*, &c., or *oneris ferendi*, *altius tollendi*, &c.⁴, the *actio confessoria* lies against the party who denies the existence of the right, and opposes any obstacle to the enjoyment of it⁵.

Actio nega-
toria.

The *actio negatoria directa* provided a remedy for those proprietors from whom a right of service was claimed, and who sued for the quiet enjoyment of their property, and the exemption from all intrusion, on the ground of a *servitus* which

¹ D. VI. 2. 17. 18.² *Id.* 11.³ Gai. IV. 4.⁴ Book II. chap. 3.⁵ I. IV. 6. 2.

they denied to have any existence¹. These actions were extended *utiliter* to other rights which could not be included in the category of services².

CHAP.
V.

5. *Hereditatis petitio* was an *actio in rem*, where the plaintiff claimed the possession of an estate, either as heir-at-law or as testamentary heir; and the action was brought to obtain the *universum jus defuncti*, where the plaintiff claimed as heir *ex asse*³.

*Hereditatis
Petitio.*

As the *jus hereditarium* might be based as well on the edict as the law, the action might be either Civil or Prætorian.

*Civil and
prætorian.*

The Civil action could only be brought by the *heres* himself; or by the *pater*, or *dominus*, where the son or slave had been instituted heir *ex testamento*. The right also extended to the heir of the heir⁴.

The action lay against him who possessed *pro herede*, i.e. he who was in possession of the estate without regard to whether he possessed *bona fide* or *mala fide*. The *hereditas* must be restored with all accessions; but in this respect the position of the *bona fide* possessor was better than that of the *mala fide* possessor. They must account alike for all profits arising after the *litis contestatio*, but the *mala fide* possessor must account for all profits extant and consumed; the *bona fide* possessor, for those only which are extant, because *bonæ fidei possessor fructus percipiendo suos facit*. The *mala fide* possessor is liable for neglect, the *bona fide* possessor is not so; and he may deduct all necessary expenses and beneficial outlay expended on the estate; but the *mala fide* possessor can claim compensation for necessary expenses only⁵.

*Liabilities
of the b. f.
and m. f.
possessors
respec-
tively.*

If the plaintiff claimed not the *universitas bonorum*, but some particular part of the estate only, this did not involve the ousting the possessor; and

¹ I. IV. 5. 2.

² Colq. 2035.

³ D. V. 3.

⁴ D. V. 3. 3; and D. L. 17. 194.

⁵ D. V. 3. 36. 5; 37. 58.

BOOK IV. he must prove what and how much he was entitled to¹.

Petitio utilis.

In the case of *bonorum possessores* the Prætor granted the *petitio utilis* against such as wrongfully detained the property². The same remedy was also available in the case of the *emptor hereditatis*.

Querela inofficiosi testamenti.

6. *Querela inofficiosi testamenti*. We have already seen³ that this action arose from the equitable coercion of the latitude given to testators by the 12 Tables: *uti legassit ita jus esto*. The validity of a will, as to its execution *jure civili*, was not allowed to prevail against the equity of the Prætor's court; and wherever children were disinherited without any just cause assigned, the will was said to be *inofficiosum*⁴; and this action was competent to them for the purpose of obtaining their *pars legitima*, or Falcidian portion. The testament in question must be in every respect legally executed, otherwise it might be treated as a nullity. The action lay reciprocally for the parent against the child, as well as for the child against the parent⁵. This was an action strictly confined to relations, but it did not extend beyond brothers and sisters⁶. Adopted and posthumous children could avail themselves of it; but the action would lie in no case where there was a remedy at law. The action was against the heir or heirs instituted in the testament.

Against whom the action lay.

Actio Serviana.

7. *Actio Serviana* is a remedy given to landlords for the recovery of rent in arrear. The stock and crop of the *colonus* were considered as tacit pledges for the rent; and this action gave the landlord the right of distraint for rent in arrear⁷. This action was necessary, because the owner not having the *dominium plenum* after he had let his estate, could not bring the *actio vindicationis*.

¹ D. v. 4. 1. 1.

² D. v. 5. 1. and 2.

³ Book II. chap. 6.

⁴ D. v. 2. 3.

⁵ D. v. 2. 1.

⁶ I. II. 18. 1.

⁷ I. IV. 6. 7.

8. *Quasi Serviana*, called *hypothecaria*, gave to creditors in general the right of selling a pignus, or of seizing and disposing of a *hypotheca* in satisfaction of their debts¹. CHAP. V.
Quasi Serviana.

9. *Actiones præjudiciales* are *actiones in rem*; *per quas quæritur an aliquis liber an libertus sit, vel servus; vel de partu agnoscendo*². The title *præjudiciales* is given them because they contain a *præjudicium*, a precedent question which has been raised, and which must be disposed of before the main action can be proceeded with, e.g. the existence of the *patria potestas* might be denied in an action, and it would therefore become necessary to settle this preliminary issue before proceeding with the main action. This action is analogous to the demurrer of the English law. The first of these actions was *ex liberali causa*. In one case, he who was treated as a slave asserted his liberty; in the other, he who was suing or defending himself was challenged as a slave. Here the main action must halt till the preliminary objection had been disposed of³. This action also lay where a man, being *ingenuus*, claim was laid to him by some one as being his *libertus*. Actio præjudicialis.
Why so called.
Ex liberali causa.

Secondly, *de partu agnoscendo*. This action had a twofold object, first, compelling the father to provide for (*agnoscere*) his legitimate child; and, secondly, the prevention of the imposition of a spurious heir. Here the questions were raised, 1. whether the child were begotten by the husband who had divorced the mother; and, 2. whether the woman was pregnant at all. De partu agnoscendo.

By the *actum Plancianum*⁴ a woman who has been divorced, if in a state of pregnancy, must announce the fact to her late husband or his family within thirty days, when they may send persons *ad inspiciendum ventrem*, and *custodes*, to take charge of the child. In case of the death of the De ventre inspiciendo.

¹ *Id.*

² *Id.* 13.

³ Hein. *Ant.* IV. 6. 34.

⁴ *D.* XXV. 3. 1.

BOOK
IV.

husband, should the widow claim possession of his estate, *ventris nomine*, on behalf of an alleged forthcoming child as heir to its deceased father, two questions arise: pregnancy or no pregnancy, legitimacy or illegitimacy. The Prætor's edict is very precise on these points; she is bound to take up her residence *in domo honestissimæ fæminæ quam ego constituam*; and she is to be duly inspected twice a month by *mulieres liberæ duntaxat quinque*, who must all make inspection at the same time; and full directions are given for the *accouchement*, and for the subsequent care of the child¹.

¹ D. XXV. 4. 1. 10.

CHAPTER VI.

Personal Actions.

Actio person- alis ex con- tractu.	Nomi- nata.	Realis.	1. Conductio, certi ex mutuo.	CHAP. VI.
			2. Commodati, directa et con- traria.	
			3. Depositum, directa et contraria.	
			4. Sequestraria, directa et con- traria.	
			5. Pignoratitia, directa et con- traria.	
	Verbalia.	1. Certi ex stipulatu.		
		2. Incerti ex stipulatu.		
		3. Beneficii ordinis.		
		4. Beneficii divisionis.		
		5. Cedendarum actionum.		
	Literalia.	Condictio ex chirographo.		
		1. Empti.		
	Inno- minata.	Consen- sualis.	2. Venditi.	
			3. Redhibitoria.	
			4. Quanti minoris.	
			5. Locati.	
			6. Conducti.	
			7. Emphyteuticaria.	
			8. Pro socio.	
9. Mandati directa vel contra- ria.				
Infactum. Præscrip- tis verbis.			1. Do ut des.	1. Actio ses- timato- ria.
		2. Do ut facias.		
		3. Facio ut facias.		
4. Facio ut des.		2. Permu- tatio.		

WE now come to the consideration of *condictiones*, or personal actions, which Ulpian defines thus: *In personam actio est qua cum eo agimus qui obligatus est nobis ad faciendum aliquid vel dandum*¹. With few exceptions these are *bonæ*

¹ D. XLIV. 7. 25. The reader is requested to refer to the contracts whence these actions arise, Book III. ch. 5.

BOOK *fidei*, or *arbitraria*; the difference between which
 IV. and actions *stricti juris* has been briefly noticed at
Bonæ fidei the beginning of the last chapter. It may be
and Arbitraria. here remarked, that their origin and establishment
 is to be referred to the departure from the *strictum
 jus* of the early period, and the gradual growth of
 equity under the Prætor; for as he in assigning
 actions to the suitors exercised equity in its largest
 sense, it became necessary for carrying out this
 principle that he should also delegate it to those
 who were to try the causes, who were in fact his
 representatives, and therefore the *formula* in each
 case always exhibited the discretionary power and
 latitude vested in the *judex*. Justinian mentions
 the *actiones bonæ fidei*¹; but these are not to be
 considered as comprehending all which come under
 that head.

It will be convenient to consider actions in the
 same order as we have done the contracts out of
 which they arise; and we will therefore begin with
 those founded on nominate contracts, the first of
 which are real contracts.

To avoid repetition, the reader is requested to
 observe that these actions lie for and against the
heredes, or representatives, of the contracting par-
 ties, unless the contrary be mentioned.

Ex mutuo.

1. *Condictio, certi ex mutuo.* On the receipt of
 a *mutuum*² the property of the *res mutuata* imme-
 diately vests in the borrower, and he becomes liable
 at all events for the restoration of the property, or
 its value, not excepting accidents. This action is
in personam, and *stricti juris*.

*Commo-
 dati.*

2. *Commodati, directa et contraria.* This is
 an action *civilis* and *bonæ fidei*. It is competent
 to the owner of the property for the recovery of
 the thing lent, together with damages occasioned
 by negligence, against the borrower. The action
 also lies against the lender to recover any expenses

¹ I. IV. 6. 28.

² Book III. ch. 5.

which have been occasioned to the borrower either by accident or the *culpa* of lender. CHAP.
VI.

3. *Depositum, directa et contraria*. Here a chattel has been deposited with the defendant with his concurrence, which he is to return when demanded, and in the mean time to keep as he keeps his own. The action is *civilis* and *bonæ fidei*, which lies for the *deponens* for the return of the *res deposita* in specie with all accessions. The *actio contraria* lies for the *depositarius* for indemnity, or the recovery of any expense occasioned to him in the due care of the property¹. Depositum.

4. *Actio sequestraria, directa et contraria*. *Sequestrum* differs from *depositum* inasmuch as it is with regard to disputed property placed in the hands of a third party. The *actio directa* lies for the successful party for the return of the *sequester* and its accessions; and the *actio contraria* against the successful party for indemnity². Sequestraria.

5. *Pignoratitia, directa et contraria*. This action is *civilis*, and *bonæ fidei*, for the recovery of a chattel pledged as security for a debt. It lies for the debtor against the creditor for the return of the chattel, and for compensation for any damages it may have received. Also an *actio contraria* of the same nature lies for the creditor for any costs he may have been at in the due care and custody of the pledge. This action is extended *utiliter* to cases of *hypotheca*. Pignoratitia.

The actions arising from verbal contracts (see Book III. c. 6) are the *actiones certi et incerti ex stipulatu*; which are unilateral and *stricti juris*, for the payment or performance of that which was certain or uncertain respectively. The Prætor extended this action *utiliter*, and so established the *actio de constituta pecunia*³. This was to meet those cases where parties at a distance agreed to pay a certain sum of money, but where there could Verbal contracts.
Constituta pecunia.

¹ D. XIV. 3. 5.

² D. IV. 3. 9. 3.

³ D. XIII. 5. 1. 1.

BOOK
IV.

be no *stipulatio* on account of absence. This action applied to one who had promised without a stipulation that he would pay that which he himself owed, or that which he was liable to pay on the part of another. The action is *utilis* and *bonæ fidei*.

*Ordinis,
Divisionis,
Cedendarum
actionum.
Ex Chiro-
grapho.*

The actions of *beneficium ordinis*, and *divisionis* and *cedendarum actionum*, applied to the verbal contracts of *fidejussors*: Book III. c. 6.

Condictio certi ex chirographo is the action arising from a literal contract¹ which lies for the creditor and his heirs, against the debtor and his heirs, for the repayment of the money advanced, and of which the *chirographum* was evidence. It is an action *stricti juris*, and *unilateralis*.

The fourth division of nominate contracts are those called consensual². The first is *emptio venditio*, out of which arose the actions *empti* and *venditi*. These actions are *civiles*, and *bonæ fidei*.

Empti.

1. The *actio empti* lies for the purchaser to compel the delivery of the thing purchased with all accessions and rights³; and on the other side, 2. the *actio venditi* lies for the seller after he has duly delivered the thing sold, for payment of the price, and interest from the day of delivery⁴. If parties have bought or sold by their agents, these actions lie *utiliter* for the principal⁵.

*Redhibi-
toria.*

Since *caveat venditor* is the doctrine of the Civil Law, two actions arose from this, viz. 1. the *actio redhibitoria*, and 2. *quantum minoris*. With regard to the former, if the vendor, *sciens reticuit*⁶, had concealed defects within his knowledge, he was bound to return the price paid, take back his property, and to place the purchaser as he found him. The sale was annulled. But the *actio quantum minoris* is for the return of a portion of the price paid on account of defects in the thing sold existing at the

*Quantum
minoris.*

¹ Book III. ch. 7.

² D. XVIII. 6. 7.

³ Id. 13. 25.

⁴ Book III. ch. 8.

⁵ D. XIX. 1. 13. 20.

⁶ Id. 13.

time of sale, but the contract was not rescinded. These actions were founded upon the Edict of the Edile¹. CHAP. VI.

The contract of *Locatio conductio* is *consensualis* and *bonæ fidei*. 5. The *actio locati* is competent to the *locator* for the payment of the price agreed upon, with interest, in case of delay, and for restitution of the object let at the termination of the contract, with damages for fraud or neglect.

6. The *actio conducti* lies for the conductor against the *locator* for the use of the thing let; or, where he is the conductor *operis*, for the price of the work and labour performed, also for the reimbursement of all necessary expenses². Conducti.

7. The *actio emphyteuticaria* is *directa* both for the *emphyteuta* and the *dominus*, to each and their heirs: to the *dominus*, for the *canon* and *laudemium*; to the *emphyteuta*, for quiet possession³. Emphyteuticaria.

8. *Pro Socio*. Partners have actions against each other which are *directæ*, *personales*, and *bonæ fidei*, and they lie to compel each to bring all into the common stock, according to agreement, and to make indemnity for negligence. Pro socio.

9. The *actio mandati* is *bonæ fidei*, and arises wheresoever business is entrusted to another to be gratuitously performed. The *actio directa* lies for the *mandans* against the *mandatarius* for the due performance of the object of the contract, to render account, and to answer for fraud and neglect. The *actio contraria* lies for the *mandatarius*, who has duly performed the mandate against the *mandans*, for all expenses and losses he may thereby have incurred. Mandati.

The above comprise the nominate actions arising from nominate contracts, which as a general rule extend to and against the *heredes* of the respective parties.

¹ D. XXI. 2.

² Book III. ch. 8.

³ l. XIX. 2. 55. 1.

⁴ l.

BOOK
IV.

*Actions
from inno-
minate
contracts.*

*In factum
or præ-
scriptis
verbis.
Æstima-
toria.*

We will next briefly consider the actions arising from innominate contracts.

When a contract is innominate the action upon it is also innominate, and is said to be *in factum*, or *præscriptis verbis*. These are actions given by the Prætor, in aid of certain contracts, or where there is a want of remedy¹; or upon innominate contracts; all of which are said to be *in factum*.

The *actio æstimatoria* is an action *præscriptis verbis*, and arises where the owner of property delivers it to another conditionally at a fixed price for the purpose of sale, leaving it at the option of the receiver to return it. Such a transaction could not come within the nominate contract of *emptio venditio*, because the agreement is to return the thing delivered if it be not sold, and in the same state as it was delivered; nor was it the contract of *locati conducti*, nor of *mandatum*. The Prætor therefore established the *actio æstimatoria præscriptis verbis*, which Ulpian calls *actio de æstimato*². The action was therefore innominate and *bona fide*. It is *directa*, and competent to the owner, who has given his property to be sold, against the receiver for its return, or the value of it. The *actio contraria* lies for the receiver for the payment of his recompence.

De permutato.

The *actio de permutato* arises from the innominate contract of *do ut des*. The bare agreement *do ut des*, except it be accompanied by the delivery of the thing in question, is a *nudum pactum*, and will so remain until the delivery be made on one side. The consideration then immediately arises, and he who has given has a cause of action against him who has received for the reciprocal delivery of what was agreed on, or the return of his own property³. And so of all other innominate contracts, as *Do ut facias*, *Faci ut facias*, &c.

¹ D. XIX. 5. 2. 3.

² D. XIX. 3. 1.

³ D. XIX. 5. 5. 1.

CHAPTER VII.

Personal actions, quasi ex Contractu.

Actio personalis
quasi ex contractu.

- | | | |
|---|--|-----------------------------|
| { | <ol style="list-style-type: none"> 1. Negotiorum gestorum directa et contraria. 2. Tutelæ directa et contraria. 3. Familiæ erciscundæ. 4. De communi dividundo. 5. Ex testamento. 6. Condictio indebiti. 7. Condictio causa data causa non secuta. 8. Condictio sine causa. 9. Quod jussu. 10. De peculio. 11. Actio tributoria. 12. De in rem verso. 13. Actio exercitoria. 14. Actio institoria. | <p>CHAP.
VII.</p> <hr/> |
|---|--|-----------------------------|

WE will now briefly notice the actions arising from obligations *quasi ex contractu*. And

1. The *actio negotiorum gestorum*, arising from the contract from which it takes its name¹, was *bonæ fidei, directa* and *contraria*. The former lies for the *dominus negotiorum*, and his heirs, against the *gestor* and his heirs, for indemnity for all damage and loss occasioned by fraud or negligence. The *actio contraria* lies for the *gestor* and his heirs, against the *dominus* and his heirs, for the repayment of all money disbursed, and necessary expenses incurred, in the management of the business in hand. If the *gestor* have mismanaged the business, or have expended money unnecessarily, the action will not lie.

2. Since the office of tutor involves the implied obligation to administer the affairs of the pupil with care, diligence and honesty, hence arises the *actio tutelæ*, which is *bonæ fidei*, and lies for the

¹ Book III. ch. 9.

BOOK
IV.

pupillus and his heirs at the termination of the *tutela*, to compel the tutor to render an account, and to recover damages occasioned by fraud, or ordinary negligence. The *actio tutelæ, et rationibus distrahendis*¹, lies also for the pupillus at the conclusion of the tutorship against the tutor who has abstracted any thing from the estate, but not against his heirs, because the action is penal², to compel the restitution *in duplum*. This action lies also *utiliter* against curators.

At the same time, the tutor and his heir had their remedy by the *actio contraria bonæ fidei*, against the pupil and his heir for expenses incurred on his behalf³. This action was extended *utiliter* against the minor in favour of the curator.

*Familia
erciscun-
dæ.*

3. The *actio familiæ erciscundæ* derives its origin from the Twelve Tables⁴, the object being to divide an inheritance among coheirs: it is *duplex* and *bonæ fidei* for the division of the common inheritance, and for adjusting all claims thereon between the parties.

*Communi
dividundo.*

4. The *actio communi dividundo*⁵ lies *prima facie* for winding up a partnership, but it applies equally to all cases where no positive partnership exists, but where property has become common to several persons, as by bequest. The action lies for the division of the property, and the adjustment of mutual claims.

*Ex testa-
mento.*

5. The *actio personalis ex testamento* is founded on the obligation of the *heres* who administers to the estate to hand over all legacies to the legatees; and therefore this action is competent to any one to whom a bequest has been left, and his heirs, against the *heres* and his heirs, to recover the thing bequeathed, or its value, together with any damage which may have been occasioned by delay, or the *culpa* of the *heres*.

¹ D. XXVII. 3.² D. XXVII. 3. 1. 23.³ D. XXVII. 4. 1. 4.⁴ D. X. 2. 1.⁵ D. X. 3. 1.

6. *Condictio indebiti*. This is the action arising out of the fact of one erroneously paying, and another erroneously receiving, more than is due. Upon the receipt of money so paid, the receiver is bound to repay it on the error being discovered. If he should not do so, an action lies for money had and received. The action is *stricti juris*, and is competent to him who has paid money not due by an error in fact, and also to his heir, against the receiver who has received it in ignorance, or he is liable to the *actio furti*¹.

CHAP.
VII.*Condictio
indebiti.*

7. *Condictio causa data causa non secuta*. This action lies for something given, there being a cause for which it is given, contrary to the *condictio sine causa*². The action lies where the receiver (of money) fails in the performance of what is agreed on, or the giver repents him of his bargain, and revokes before the performance is accomplished: e.g. I pay you so much money on condition that you shall manumit *Stichus*. If you do not manumit him, I can recover the money back by this *condictio*; or if I change my mind, and give you notice, I can also recover back the money³; so that the *causa non secuta* on which the action is founded may arise either from the default of the receiver, or the revocation of the giver. The action is *stricti juris*, and lies for the giver and his heirs against him who has not performed his part of the agreement, and his heirs, for the redelivery of the thing given.

*Condictio
causa data.*

8. *Condictio sine causa*. The ground of this action is clearly explained by Ulpian⁴. A *fullo* who had received clothes to clean, lost them, and paid the owner their value, as he could be compelled to do under the action *locati conducti*. The owner afterwards found them. This action lies to recover back the amount so paid, *quasi sine causa datum*. The owner of the property had suffered

*Condictio
sine causa.*¹ D. XLVI. 38. 1.² *Id.* 3. 2.³ D. XII. 4. 1.⁴ D. XII. 7. 2.

BOOK
IV.*Quod
jussu.*

no loss, and so the payment was *sine causa*, made upon no consideration: and so in like cases.

9. *Quod jussu*¹. By *jussus* is understood the command given to one who is under the controul of another as a *fil. fam.*, or a slave: if, therefore, the father or master have authorized the son or slave to contract an obligation with respect to his affairs, he can be sued upon it by this action². It is an *actio utilis* which lies for him who has contracted with a *fil. fam.*, or a slave acting under the command of the father or master, against such father or master.

*De pe-
culio.*

10. *De peculio*³. This action is founded on the Prætor's edict, and had in view the *peculium profectitium* of the son or slave. It can only arise out of a lawful contract, and lies for those who have contracted with a *fil. fam.*, or a slave, against the father or master, to recover to the extent of the *peculium*, allowing them first to deduct their just claims; provided the transaction did not come within the *Scutum Macedonianum*, which provided a perpetual exception to all actions for money lent to a *filius familias*⁴.

*Scutum
Macedoni-
anum.**Tributoria.*

11. *Actio tributoria*. This is a prætorian action, and lies where a pater familias or dominus has allowed the son or slave to trade with his *peculium profectitium*. He is in that case not permitted, as in the action *de peculio*, to put forth his own claims in preference, but must share *pari passu* with the other creditors⁵. The trading must be *sciente patre, vel domino*, and the action lies for those who have contracted with the son or slave, against those in whose power they may be, for an equal, and *pro rata* distribution of the *peculium*.

*De in rem
verso.*

12. *De in rem verso*. This action lay against a paterfamilias or dominus. Where a son or a slave had received and laid out money in and

¹ D. xv. 4. 1.² D. xv. 1. and Book II. ch. 4.³ Gai. iv. 70.⁴ D. xiv. 6.⁵ D. xiv. 4.

about their necessary affairs, this would render them liable to the parties to whom such money might be due. For example, where a *fil. fam.* or a slave borrowed money from any one for the purpose of supplying himself with necessary food and clothing, according to the rank and circumstances of the father or master¹, an action lies against them for its recovery. Nor will accidental circumstances which supervene prevent the father or master from being equally liable. A slave bought corn for the household, and before it was used it was burnt; so he laid out money in repairing the house which afterwards fell down; the master was nevertheless liable². If the money were not employed for the use of the master he was not liable, as where the slave borrowed it on false pretences³. This action therefore lies *ex equitate*, it being a *quasi* contract on the broadest basis, against the father or master in favour of any one who has contracted with a son or slave, and his heirs, where the money or property advanced has been for the use and benefit of such father or master.

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VII.

13. *Actio exercitoria*. The *exercitor navis* is *Actio exercitoria*. he who is the owner of a vessel, or who hires it from the owner for the purposes of trade⁴. The *magister navis* is he who is in the service of the *exercitor*, and who has the management of it, that is to say, the supercargo⁵. The object of this action is to render the *exercitor* liable for the acts of his *magister*, inasmuch as they stand in the position of principal and agent⁶. The acts of the *magister* must be strictly within the scope of his employment, or they will not bind the *exercitor*. It is therefore a remedy founded on the edict of the Prætor; and the action lies for all those who have contracted with the *magister*, and their heirs, against the *exercitor* and his heirs.

¹ *D.* xv. 3. 3. 3.

² *Id.* xv. 3. 9.

³ *Id.* i. 1.

⁴ *Id.* 7. 8.

⁵ *D.* xiv. 1. 15.

⁶ *Gai.* iv. 71.

BOOK
IV.

If there be several *exercitores*, they are liable in solidum¹.

Actio Institoria.

14. *Actio Institoria*. The *Institor* is any one who is employed to carry on the business of another; and Paulus defines him as one *qui tabernaculo, ad emendum vendendumve proponitur; qui que sine loco ad eundem actum proponitur*², so that he might even be a travelling hawker on behalf of his employer; and an action was established to render the principal liable for the acts of such his agent, similar to the *actio exercitoria*. If there were several principals, they were all liable in solidum. The action was perpetual, and lay in *heredem et heredibus*³.

Mixed actions.

Mixed actions are described as those which involve claims *tam in rem quam in personam*, and Justinian instances the actions *Familia erciscunda*, *communi dividundo*, and *finium regundorum*. In such actions the *vindicatio* and the *condictio* combine, viz. the *actio in rem* for the recovery of the property, and the *actio in personam* for damages and mesne profits. The *hereditatis petitio* is also a mixed action. The primary object of the action is *in rem*, the acquiring possession of the estate; but the *actor* is also entitled to an account of all mesne profits, and damages for the detention of his property. The creating this third class of actions has been censured by some writers, who consider that the action should be classed as real or personal, according as it approaches nearer to the *vindicatio*, or the *condictio*.

Arbitrary actions.

In the *hereditatis petitio* the personal claim is subordinate to the real claim; this is therefore a real action: on the other hand, the *actio familia erciscundæ* admits the *jus in rem*, the real dispute being of a personal nature, which therefore makes it a personal action⁴. With regard to arbitrary actions, Justinian describes them as *Ex arbitrio*

¹ D. XIV. 1. 1. 25.² Id. 15.³ Id. 3. 18.⁴ Colq. 2044.

judicis pendentes. They are both *in rem* and *in personam*. Certain actions of this kind are specified (I. 4. 6. 31), but the Emperor continues, *Et cæteris similibus, permittitur judici ex bono et æquo secundum cujusque rei de qua actum est naturam æstimare, quemadmodum actori satisfieri oporteat.* CHAP.
VII.

It may be said that all real actions are arbitrary actions, with the exception of *Hereditatis petitio*, as well as many others which we have already considered under the head of personal actions. We will here notice several which come more particularly within that class.

And first the *actio De edendo*¹, which was based upon the Prætor's edict, and lay against a banker (*Argentarius*) to compel him to shew his books, *edere rationes*, to a creditor, as far as they concerned his account: *ut rationem cuilibet quantum ad eum pertineat, edant*². The action was competent to the party interested, and his heirs, who had failed to render the account when called on. *Actio de edendo.*

The *actio Finium regundorum* lies for the owner of an estate, a *prædium rusticum*, for settling disputed boundaries. The powers of the *judex* in this case are arbitrary in the extreme; for if *amovendæ veteris obscuritatis gratia per aliam regionem fines dirigere velit, potest hoc facere*³. It is a personal action⁴; for at the same time that the boundaries were fixed all claims between the *vicini* of a personal nature were settled and determined. *Finium regundorum.*

The *actio De aquæ pluvie arcendæ* lies where water caused by rain occasioned damage to land, and lies *directa* for the owner of the land against one who by either erecting a dam, or removing one, has so thrown the water upon the actor's estate⁵. The same action lay *utiliter* for the *usufructuarius*⁶. *Aqua pluvie arcendæ.*

The *actio Faviana et Calvisiana* was for the *Faviana et Calvisiana.*

¹ D. II. 13. 1.

² Id. 13. 4.

³ D. X. 1. 2. 1.

⁴ Id. 1. 1.

⁵ D. XXIX. 3. 1. 1.

⁶ Id. 22.

BOOK IV. redress of patrons who had been defrauded of their rights by their *liberti*, who were bound to leave them a certain share of their property¹. If the *libertus* died testate, the patron had his remedy by the *actio Faviana*; if intestate, by the *actio Calpistriana*².

Quod certo loco dari oportet.

Condictio de eo quod certo loco dari oportet. When a party had bound himself to pay at a certain place, *Ephesi dare*, this was part of the contract, and he could not pay elsewhere unless the creditor allowed it³. But suppose he refused to pay at all, the creditor might then sue him *in foro domicilii*, in the court of the place where he lived; in which case it was decided upon the *arbitrium* of the judge as to what was due to the *actor*, allowing for any losses he might have incurred from the payment not being made at the time and place agreed on. The action lay for the *actor* and his heirs, against the *reus*, his heirs and sureties.

Pluris petitio.

Pluris petitio. This involved an *actio arbitraria*, where a plaintiff had made a greater claim than he was warranted in doing in his *intentio*; this was presumption of an attempt to defraud. If he did so, *causa cadit, id est rem perdit*⁴, he was nonsuited, nor could he obtain a new trial, unless he shewed that his *intentio* was framed upon a clear mistake on his part. The *intentio* must agree with the contract *re, tempore et loco*; if therefore the plaintiff claimed more than he ought, or before the day, or at some other place than that agreed on, he lost his suit. Also, if the agreement were to give *Stichus*, or *centum aurei*, and he claimed one of these without giving the alternative to the defendant, it was *pluris petitio*; he was nonsuited, and lost that which was really due to him. The Prætor might grant him a new trial at his discretion. Afterwards by a constitution of the emperor Zeno, it was determined, that where more was de-

¹ D. XXXVII. 14. 16.

² D. XIII. 4. 9.

³ D. XXXVIII. 5. 3. 2, 3.

⁴ Gai. IV. 53.

manded than was due, the plaintiff was mulcted in triple damages¹. CHAP.
VII.

*Actio ad exhibendum*². This is a personal action, and lies for him who is bringing an action to recover some specific thing, for the purpose of compelling the possessor to produce it, that he may ascertain if it be really the property to which he lays claim, as in the *actio depositi*, or *commodati*³. *Actio ad exhibendum.*

The actions for obtaining the *restitutio in integrum* on the various grounds of *metus*, *dolus*, *ætas*, *status mutatio*, *absentia rei-publicæ causa*, *vi alienatio*, and *error* will be sufficiently understood by reference to that subject, Book III. c. 11, without being repeated here. *Restitutio in integrum.*

¹ I. IV. 6. 33.

² D. I. 4. 1.

³ *Id.* 4.

Actions ex Delicto.

Acciones ex delicto.

1. **Condictio furtiva et actio furti.**
2. **Actio rerum amotarum.**
3. **de vi bonorum raptorum.**
4. **legis Aquiliae.**
5. **de iniuriis et famosis libellis.**
6. **ex lege Cornelia.**
7. **de albo corrupto.**
8. **de servo corrupto.**
9. **contra mensorem.**
10. **contra eum qui iniquum statu-**
erat aut impetraverat.
11. **contra eum qui jus dicenti non**
obtemperaverat.
12. **de in jus vocando.**
13. **de calumniatoribus.**
14. **de in jus vocato non eximendo.**
15. **tutoris suspecti.**
16. **actio noxalis.**
17. **de pauperia.**
18. **de pastu.**

**Acciones quasi
ex delicto.**

1. *Actio litis suæ factæ.*
2. *de dejectis et effusis.*
3. *de positis.*
4. *de recepto.*
5. *Condictio ob turpem causam.*

¹ *J.* IV, 6, 21.

those *ex contractu*: these have been already considered; and therefore do not come within the subject of the present chapter; but where the penalty was in *duplum*, in *tripulum*, or in *quadruplum* these always contained the thing itself, or its value, so that the mulct was in reality once, twice, or thrice the value of the thing sought to be recovered, according to circumstances.

CHAP.
VIII.

1. The remedy in the case of *Furtum* was of a compound nature, consisting of the *Furti actio*, and the *condictio furtiva*; of which Ulpian speaks thus: *Furti actio pœnam petit legitimam; condictio rem ipsam; ea res facit, ut neque furti actio per conditionem, neque condictio per furti actionem consumatur*¹. The former of these therefore lies for the penalty, the latter for the recovery of the thing stolen.

The *Condictio furtiva* lies only for the owner, or some one who has a qualified interest in the property, as a pawnee². The *furti actio* is competent to all interested in the property against the thief and all accessories before the fact³. It lay, therefore, for the owner, and all interested in the thing stolen, and also for their heirs, against the thief, and all accessories before the fact, but not against heirs, because *ex delicto defuncti heres non tenetur*⁴.

2. There could be no *furtum* between husband and wife; but when either during coverture had misappropriated the property of the other, in case of divorce or death, it might be recovered by the person so deprived, or his heirs, by the *actio rerum amotarum*⁵. If the thing so taken from husband or wife by the other were the property of a third party, it might be recovered by an *actio in factum*, notwithstanding the coverture.

3. The *actio de vi bonorum raptorum* is founded

Actio de vi bonorum raptorum.

¹ D. XIII. 1. 7. 1.

² I. IV. 1. 13. 14.

³ Id. 1. 11.

⁴ Book IV. ch. 1.

⁵ D. XXV. 2.

BOOK
IV.

on the Prætor's Edict¹. It applied to moveables only, and lay equally against the principal and those acting under his orders. The action is in *quadruplum* within the year, afterwards in *simplum*. The edict contains a second clause, *de turba*, to meet cases arising out of what would be called a riot. The penalty within the year was in *duplum*, afterwards in *simplum* against the party doing the damage².

*Actio legis
Aquilie.*

4. *Actio Legis Aquiliæ*. It has been before observed³ that the *Lex Aquilia* abrogated all laws anterior to it respecting *damnum injuria datum*. The penalties provided against the delinquent are the greatest value the thing was worth, which had been destroyed or damaged, within the year or month previous. If the defendant deny the charge, the penalty was in *duplum*. This action was also extended *utiliter* to meet all cases of *damnum injuria datum*. The action lies for the party injured, and his heirs, against the delinquent.

*Actio de
injuriis.*

5. *Actio de injuriis et famosis libellis*. The law respecting *injuria* has been before explained. The penalty awarded by the Prætor in this action was pecuniary⁴. It did not survive to the heirs of the plaintiff unless the *litis contestatio* had taken place.

*Ex lege
Cornelia.*

6. *Actio ex Lege Cornelia*. It has been observed that the *Lex Cornelia* was passed for the purpose of restraining certain atrocious injuries accompanied with violence⁵. The punishment by this law was both civil and criminal⁶, the penalty being left in the former case to the discretion of the judge; in the latter it was banishment, or condemnation *ad metalla*, or in *opus publicum*⁷.

7. *Actio de albo corrupto*. This was an action against one who defaced or carried away the Præ-

¹ D. XLVII. 8. 2.² Id. 4.³ Book IV. ch. 1.⁴ Gai. III. 224.⁵ D. XLVII. 10. 5.⁶ Id. 37. 1.⁷ Paul. R. S. v. 4. 8.

tor's *album*, and lay against principal and agent. The penalty was 500 *aurei*¹. CHAP.
VIII.

8. The *actio de servo corrupto* is founded on the Prætor's Edict. It establishes a remedy against one who corrupts the slave of another. The act must be *dolo malo*. The nature of the corruption might be either *corpore* or *animo*, such as persuading him to ascend the house-top, or descend into a well, whereby a limb was fractured; or inducing him to be *luxuriosus*, or *contumax*², and so making him a worse slave for his master. The action lies *utiliter* for him who had the usufruct of the slave³; and also for the father of a child corrupted⁴. It lies for the owner of the slave, the usufructuary, and the father, *in duplum*, for double the estimated amount of damage. *De servo corrupto.*

If one slave corrupt another, the remedy is by a noxal action against the owner⁵.

9. *Actio contra mensem*⁶. The *mentor* was, in fact, a land-surveyor. Inasmuch as the *mentor* was remunerated by a *honorarium*, and not by a *merces*, he could not be brought within the action *locati conducti*, and on this account the Prætor granted a special action for the relief of those who had been damaged by any misconduct of the party employed. The action lay *directa* against the *mentor qui falsum modum dixerit*, who had made a false return; and *utiliter* against the *machinarius* who had, without due care, accepted and reported the wrong measurement⁷. The plaintiff must prove *dolus*, or *culpa lata*; for if he employed a *mentor imperitus*, he had no remedy: *sibi imputare debet*⁸. *Contra mensem.*

The action lay for the plaintiff, and his heir, against the *mentor* for the amount of damage suffered. Ulpian says the Prætor extended this

¹ D. II. 1. 7.

² Id. 9. 1.

³ Id. 3. 5. 3.

⁴ Id. 7. 1.

⁵ D. XI. 3. 2.

⁶ Id. 14. 1.

⁷ Id. 6. 1.

⁸ Id. 1. 1.

BOOK IV. remedy *utiliter* to the measurement of buildings, corn and wine¹.

Contra eum qui iniquum statuerat.

10. *Actio contra eum qui iniquum statuerat aut impetraverat*². Ulpian says that this Edict *summam habet æquitatem*. It applied to a magistrate who, in the execution of his duty, had ruled something contrary to strict law, and the Edict declared that if such an one were placed in the same position, that he should be bound to submit to the same ruling himself: and the Edict also extended this, making it to apply as between suitor and suitor. Notwithstanding the equity which Ulpian claims for it, it would appear a strange proceeding in these days; and it is altogether unlike the usual good sense displayed by the Roman Law.

Qui jus dicenti non obtemperaverat.

11. *Actio contra eum qui jus dicenti non obtemperaverat*. This was a penal action which lay against all who resisted the execution of the decree of a magistrate, and must be brought within the year.

In jus vocando.

12. *Actio de in jus vocando*. The Prætor declared by his Edict that patrons and parents, to whom unlimited respect was due, *sine permissu meo nequis vocet*³. Liberti and children were forbidden to take legal proceedings against them without the special permission of the Prætor. The action is personal, and lies for the person summoned against the summoner.

De calumniatoribus.

13. *Actio de calumniatoribus*. The Prætor's Edict on which this action was founded runs thus: *In eum qui ut calumniæ causa negotium faceret, vel non faceret, pecuniam accepisse dicitur: intra annum in quadruplum ejus pecuniæ quam accepisse dicitur: post annum simpli in factum actio competit*⁴. *Calumniæ* in its legal sense means false accusation, or chicanery; and the Edict was intended to meet those cases where persons received

¹ D. XI. 5. 2.

² D. II. 2. 1.

³ Id. 4. 4. 1.

⁴ D. III. 6. 1.

money for bringing a vexatious action against another, or for forbearing to sue where the ground of action was unexceptionable—*facere vel non facere*. Such an one was said to act *calumniæ causa*. The receipt need not be money,—any thing instead of it would bring the case within the Edict¹. All who were *turpiter pacti*², who entered into a dishonest agreement for this purpose, were considered as *calumniatores*. The action lies against the receiver, if within the year *in quadruplum*, afterwards *in simplum*.

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VIII.

14. *De in jus vocato non eximendo*³. The object of this action was, during the old form of process, to compel those who had interposed, and forcibly rescued a defendant, to compensate the plaintiff for having deprived him of his remedy at law. *In jus vocato non eximendo.*

15. *Actio tutoris suspecti*⁴. Tutors against whom a grave suspicion of mismanagement arose, whether from fraud or negligence, were liable to the *actio suspecti*⁵. It mattered not how the Tutor was appointed, i. e. whether he were testamentary, legal, or dative; or whether he had given security or not. If the action were brought against him, he was removed from all administration till the enquiry was over. Anybody might act as accuser, because the office of tutor is *quasi publicum*, and therefore the offence the same⁶. Pupils could not act as accusers against their tutors, but adults might accuse their curators with the advice of their relatives⁷. Women who were nearly related might act as accusers; so also a co-tutor⁸. If the accusation were not proved against the tutor, he was bound to return to the administration of his duties. The action expires with the office or the death of the tutor or curator. *Tutoris suspecti.*

¹ *Id.* i. 14.

² *D.* ii. 7. 1.

³ Book i. ch. 9.

⁴ *Id.* i. 7.

⁵ *Id.* 3. 2.

⁶ *D.* xxvi. 10.

⁷ *D.* xxvi. 10. 1. 4.

⁸ *Id.* 3.

BOOK
IV.*Actio noxalis.*

16. *Actio noxalis.* This action arose from the *delictum* of a slave or a *Filius familias*. If these had caused damage to any one, the master or father was bound to repair it; and they had the option of paying the damage, or of surrendering up the offender in satisfaction; as it was considered *iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisve damnosum esse*¹. This action is as old as the Twelve Tables, and was afterwards extended by the *Lex Aquilia*, and the Prætor's Edict². It has been suggested that the origin of this action was the right of the damaged party to seize and detain the offender.

*Omnes noxales actiones caput sequuntur*³, therefore if a slave, who had committed a *noxæ*, were sold by his master, his new master was liable, like a man who marries a woman in debt.

The action lay for the person damaged against the possessor of the slave for the surrender of the slave, or his value⁴.

De pauperie.

17. *Actio de pauperie* was the remedy provided when the damage had been done by a four-footed beast, such as a kicking horse or a bull that gored. It did not apply to wild beasts of a savage nature: any damage occasioned by these was provided for by the Edict of the Edile, which forbade them to be kept *qua vulgo iter fit*, near a highway or footpath. The owner must give up the animal, or pay its value⁵.

De pastu.

18. The *actio de pastu* has its origin in the Twelve Tables. It was the case of cattle damage *feasant*, and in a later period redress was had from the *Lex Aquilia*⁶.

Actions quasi ex delicto.

We will now very briefly mention the several actions arising from *quasi delicta*, which are explained in the second chapter of this book.

1. *Actio litis suæ factæ.* If a *judex* in the

¹ Gai. IV. 75.² *Id.* 76.³ *Id.* 77.⁴ *D.* IX. 4. 21.⁵ *I.* IV. 9. pr. and 1.⁶ *C.* III. 35. 6.

discharge of his duty gave a wrong decision *per imprudentiam*, he became liable *quasi ex maleficio*¹; and an action lay for the person thus injured against the judge. CHAP. VIII.

2. The action *de dejectis et effusis* is based on *De dejectis et effusis*. the Edict², and lay against the inhabitant of a house, for throwing or pouring something from a window, whereby damage was done. The penalty was *in duplum*, and the action survives for, but not against the heir.

If the act were done by a slave, a noxal action lay against the master.

3. *Actio de suspensis et positis*. This was the action provided by the Edict³ against those who placed or suspended things over a place of public resort, so as to be dangerous in case they fell. The penalty was twenty *solidi*⁴. *In suspensis et positis.*

4. *Actio de Recepto* was the action which lay *De recepto*. against the *Nautæ cauponæ et stabularii*,—carriers by water or land, and innkeepers,—for things lost, stolen, or destroyed whilst in their possession. It renders them liable for the acts of their servants, and lies *in simplum*, and therefore against their heirs.

5. *Condictio ob turpem causam*⁵ lies where one has given to another something for a base or unjust cause, which attaches to the receiver only. It is a personal action *quasi ex delicto*, where one has honestly given something for a base consideration, and lies for him and his heirs against the party who has received it for such base consideration, for the return of the thing or its estimated value⁶. *Ob turpem causam.*

¹ D. L. 13. 6.

² *Id.* 4. 5. 6.

³ D. XII. 5.

⁴ D. IX. 3. 1.

⁵ Book IV. ch. 2.

⁶ Colq. 1978.

CHAPTER IX.

Pleas.

BOOK
IV.

BEFORE proceeding to the subject of Pleas, it is necessary to notice those persons employed to represent the *actor* or the *reus* in an action. These were *cognitores*, *procuratores*, and *defensores*.

We learn from Gaius¹, that before the *legis actiones* were set aside, no one could sue in the name of another, *nisi pro populo et libertatis causa*; and it was not until the formulary period that what we should call attorneys and proctors were recognized.

*Cognitor,
how ap-
pointed.*

The appointment of a *cognitor* must be made in court by the *actor*, and in the presence of the *reus*, in this form: *Quod ego a te fundum peto in eam rem Lucium Titium tibi cognitorem do*. The actor having thus obtained the right of appointing his representative in court, the same right could not be denied to the *reus*, who therefore, if he thought proper to defend by deputy, replied: *Quandoque tu a me fundum petis in eam rem Publium Mævium cognitorem do*²; and the battle was then fought out between Lucius Titius and Publius Mævius, on behalf of their respective clients.

Procurator.

The difference between the *cognitor* and the *procurator* was, that the latter acted upon the mandate of his employer³, and might be appointed by either party in the absence, and without the knowledge of the other⁴. When an action was conducted by a *cognitor* or *procurator*, the *intentio* ran in the name of the *actor*, but the *condemnatio*

¹ Gai. iv. 82.

² D. iii. 3. 1.

³ Id. 83.

⁴ Gai. iv. 84.

in that of the *cognitor* or *procurator*; thus, if Publius Mævius sued by his *cognitor* Lucius Titius, the formula ran thus: *Si paret Numerium Negidium Publio Mævio sestertium decem millia dare oportere judex Numerium Negidium Lucio Titio sestertium decem millia condemna, &c.* CHAP.
IX.

The *defensor* appears to have been nothing more than a *negotiorum gestor*, who voluntarily appeared in defence of an absent defendant, as he is described as *quemvis verba pro eo facientem*¹, and whom the court would hear without calling on him to prove his mandate. Defensor.

The *cognitor* was not required *satisdare*, to give security, because he was appointed in court, and he and the *actor* were considered as the same person; but the *procurator* was obliged to give security *ratam rem dominum habiturum*, because the *actor* might bring his action again through the default of the *procurator*². Cognitor
gave no security.

When in an action the *actor* had set forth his *intentio*, or, in the language of our own law, had filed his declaration, the *reus* met him with his *exceptio*. Paulus says, *Exceptio est conditio, quæ modo eximit reum damnatione, modo minuit damnationem*³: a circumstance (alleged by the *reus*) which either sets aside the ground of action, or goes to diminish the claim of the *actor*. Exceptio.

The *exceptio* appeared in the formula sent down to the *judex*: so where the plea was *dolus malus* it ran thus: *Si in ea re nihil dolo malo Auli Agerii factum sit neque fiat*. Or where the *reus* denied the agreement on which the action was brought; e.g. *Si inter Aulum Agerium et Numerium Negidium non convenit ne ea pecunia peteretur, &c.*⁴ The *judex* was therefore bound to inquire fully into the truth of the allegation of the *reus*, and to return his judgment accordingly. Appeared
on the formula.

¹ D. III. 3. 33. 2; and 5. 1.

² D. XLIV. 1. 22.

³ Gai. IV. 97—8.

⁴ Gai. IV. 119.

BOOK
IV.Pleas either
Civil or
Prætorian.

Pleas were either civil or prætorian; the former being founded on some law or *scutum*, as that of *non numerata pecunia* or *sciti Velleiani*. The latter owe their origin to the edict, as *doli mali*, *metus*, *causa*, &c.

Pleas were also peremptory or dilatory.

Peremptory
or

Peremptory pleas are such as, if proved, give a complete *quietus* to the demand of the actor, e.g. *quod metus causa*; or *quod contra legem, scutum factum est*; or *quod res judicata*, that the actor has already had judgment; or that there has been a *pactum conventum* in which he has bound himself not to sue¹.

Dilatory.

Dilatory pleas were those which, without destroying entirely the claim of the actor, and his right to sue, have the effect of deferring his action. Such were the pleas *litis dividuæ*, and *rei residuæ*; the former of which applied where the actor brought his action for a part of his claim only, and then brought a second action for the rest *intra ejusdem præturam*. This was splitting an action, and the proof of the plea would nonsuit him; but he might repeat his action as soon as the next Prætor took office. The plea of *rei residuæ* operated to stay the action where the actor, having several claims against the *reus*, had prosecuted some of them, but had deferred the rest to be tried by a different *judex*; if he instituted a fresh action *intra ejusdem præturam*, during the continuance of the same Prætor, he lost his cause. If the actor rashly proceeded in the face of the *exceptio dilatoria*, and it was duly proved, his right of action was gone for ever; for if he attempted to sue again, he was met by the *exceptio rei judicata*, which put him out of court.

Res judi-
cata.

Gaius mentions a dilatory plea arising from the person of the *cognitor*, or the right of the actor to appoint one, as where the person appointed was unfit, or where the actor had no right to appoint a

¹ Gai. IV. 121.

cognitor at all. In such case the action must abate, and the right of a new action was reserved. But if the *actor* persisted in proceeding in the face of such a plea, he could not have a new trial¹. If the *reus* erroneously omitted to avail himself of a peremptory plea when he might have done so, he might demand a new trial; but it is questionable if he could do so in the case of a dilatory plea².

CHAP.
IX.

The next move was with the *actor*, who must meet the *exceptio* with his *replicatio*. *Replicatio est contraria exceptio, quasi exceptionis exceptio*³. Or as Gaius has it, *replicatio vocatur quia per eam replicatur, atque resolvitur vis exceptionis*⁴. For example, Titius sues Mævius for the payment of a certain sum of money which he owed. Mævius pleads that Titius agreed not to demand payment. Titius replies, that though there was such an agreement, it was subsequently agreed that Mævius should pay on demand; and this replication appears on the formula thus: *Si non postea convenit ut eam pecuniam petere liceret*. Again, the *actor* brought his action for something sold at an auction. The *reus* pleaded that he was not liable to pay, inasmuch as the thing had not been delivered. The *actor* replied, that *in actione prædictum est*, or, as we should say, the conditions of sale were, that nothing should be delivered till the money was paid. The replication therefore stood thus on the formula: *Aut si prædictum est ne aliter emptori res traderetur quam si pretium emptor solverit*⁵.

Replicatio.
Definition.

Examples.

If the *reus* had an answer to the *replicatio*, he then pleaded his *duplicatio*, which the *actor* might again answer by his *triplicatio*, beyond which the pleading seldom went.

Duplicatio.

Triplicatio.

¹ Gai. IV. 124.

² Id. 125.

³ D. XLIV. 1. 22. 1.

⁴ Gai. IV. 126.

⁵ Id.

CHAPTER X.

Interdicts.

BOOK
IV.

WE now come to the subject of Interdicts, which had their origin in the *Jus honorarium*. They emanated from the *Imperium* of the Prætor, and exhibited in a striking manner the fulness of his equitable jurisdiction.

The term *interdictum*, from *inter* and *dico*, signifies the adjudging some point in dispute between contending parties.

Interdicts.

*Exhibito-
ria.
Restitu-
toria.
Prohibi-
toria.*

Interdicts were actions, for Ulpian says, *interdicta quoque actionis verbo continentur*¹. They were called *Decreta* when any thing was ordered to be done, as that something should be exhibited, or restored; and *Interdicta* when any thing was forbidden to be done; whence they were classed under three heads, *Exhibitoria*, *restitutoria* and *prohibitoria*.

*Difference
between In-
terdicts and
Actions.*

The distinction between an action and an interdict was a wide one. In the former the Prætor made no order upon the subject in dispute. He declared *judex esto*, if sufficient cause of action were proved, and left it to the *judex* to try the case; but in an Interdict the Prætor made a definite and specific order that some particular thing should be done, or should not be done. The party applying for relief must show sufficient cause, i. e. prove to the satisfaction of the Prætor that his case came within the Edict. If he failed, there was an end of the case; but if he succeeded, the Prætor pronounced his Interdictum; e. g. *Exhibeas*, or *Restituas*, or *Vim fieri veto*, as the case might be; and though further proceedings might

¹ D. XLIV. 7. 37.

be necessary, they only went to execute the Prætor's order. If the *Reus* thought it just and prudent to comply at once with the terms of the Interdict, there was an end of the case. But suppose the *Reus* should show cause why the Interdict should not be put in execution against him, here the dispute was not terminated with the order of the Prætor, and he would accordingly appoint a *judex*, or an *arbiter*, whom he would direct to inquire into the facts of the case, as whether any thing had been done contrary to the Edict, or whether the Interdict had been fully obeyed¹. But the *Reus* must appeal at once, *ante quam a Prætore discedit*², or the Interdict was conclusive. In prohibitory Edicts there was always a *sponsio* by way of security, entered into by both parties, the payment of which fell upon him against whom the *judex* decided, but the *sponsio* was not always required in those Interdicts which were exhibitory or restitutory³. CHAP.
X.

If we take as an example the proceedings in the prohibitory Interdict *uti possidetis*, it was the duty of the *judex* to investigate and settle the dispute; viz. which of the claimants was entitled to the undisturbed possession. In such a case it was usual for one of the claimants to get possession of the *fructus*, the growing crops, by bidding against the other⁴, *licitatione*⁵, these being handed over to him *qui plurimum licitando alterum superasset*⁶, to abide the decision of the *judex*; and then he against whom the decision of the *judex* was given was obliged to surrender the property, to pay the *sponsio*, and the sum at which he had taken the crops, and any intermediate profits which had arisen.

Gaius classes Interdicts under three heads:

1. *Prohibitoria*. 2. *Restitutoria*. 3. *Exhibitoria*.

¹ Gai. IV. 141.

² *Id.* 164.

³ *Id.* 141.

⁴ Because while the matter was in dispute these might perish.

⁵ *Id.* 166—7.

⁶ Hein. *Ant.* IV. 15. 6.

BOOK
IV.*Simplicia
and Dup-
plicia.*

Or *retinendæ possessionis*—*recuperandæ* and *adipiscendæ*. He also distinguishes them as *simplicia* and *dupplicia*¹. With regard to this last division he describes his meaning thus: *Simplicia sunt velut in quibus alter actor, alter reus est, qualia sunt omnia restitutoria, aut exhibitoria, nam actor est qui desiderat aut exhiberi, aut restitui, reus est a quo desideratur ut exhibeat, aut restituat*². But the prohibitory Edicts were occasionally *dupplicia*, because both parties stood at the same time in the position of *Actor* and *Reus*, of which kind were the Interdicts *uti possidetis*, and *utrubi*, where both claimed the same thing³.

As instances of Interdicts, 1. *Retinendæ possessionis*, 2. *Recuperandæ*, and 3. *Adipiscendæ*, we may take the following examples:

*Retinendæ
possessionis.*

1. The Interdicts *retinendæ possessionis*, or for quiet enjoyment, were principally those called *uti possidetis*⁴ and *utrubi*⁵, the former relating to *res immobiles*, the latter to chattels. With respect to the former, the Prætor decided in favour of him who *nec vi, nec clam, nec precario ab adversario possidebat*⁶.

In the Interdict *utrubi hic homo, &c.* the question was, in the time of Gaius, which of the claimants had had the longer possession, *hoc anno*, during the preceding year, *nec vi, nec clam, nec precario*. The time was reckoned backwards (*retrorsus*): therefore if one party had possessed the thing for five months, and the other for seven, possession was granted to the latter. Moreover it was allowed an heir, or a purchaser, to include the preceding *justa possessio* of the deceased, or the vendor. Nor need possession be a continuous corporeal possession: that of a tenant, or of some one to whom the thing had been lent was sufficient; and absence with the *animus retinendi* would satisfy the Edict⁷.

¹ Gai. IV. 156.² *Id.* 157.³ *Id.* 160.⁴ *D.* XLIII. 17.⁵ *Id.* 31.⁶ Gai. IV. 150.⁷ *Id.* 151—3.

2. The Interdict *recuperandæ possessionis* is illustrated by that called *Unde tu illum vi deiecit*¹, CHAP.
X. which provided a remedy for those who had been forcibly deprived of possession, by compelling the restitution, provided he who had suffered ejection had not possessed *vi*, or *clam*, or *precario* from the ejector². It applied only to real property, *res immobiles*, and the ejector was liable for the violent acts of all who acted under his authority express or implied³. *Recuperandæ.*

3. Of the Interdicts *adipiscendæ possessionis* *Adipiscendæ.* we may take as an example that *Quorum bonorum*⁴, by which the *bonorum possessor* acquired possession of the property adjudged to him by the Prætor. It applied also to a purchaser where the vendor refused to deliver possession. Also the *Interdictum Salvianum*⁵, which was for the relief of landlords for obtaining so much of the tenant's crop as should cover the rent; and was, therefore, in the nature of a distraint.

The reader should consult the forty-third Book of the Digest *de Interdictis*.

There are two subjects connected with the Prætor's interdictorial power which it will be well to notice more particularly, viz. *Nunciatio novi operis* and *De damno infecto*.

In the case of *Nunciatio novi operis*⁶ the Prætor's jurisdiction was prohibitory in the highest degree, because it went to restrain the owner of property from prosecuting some work on his estate. *Nunciatio novi operis.*

Nunciatio novi operis means a notice calling on a party to desist from, or even not to begin, a *novum opus* on his own property, on the ground that the *nuncians* will be damaged thereby. It applies therefore to prospective damage, that which is doing, but not yet done. The object of the

¹ D. XLIII. 16.

² Gai. IV. 154.

³ D. XLIII. 16. 1—6. 11. 13.

⁴ D. XLIII. 2.

⁵ *Id.* 33.

⁶ D. XXXIX. 1.

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IV.

nunciatio is to compel the party to desist, or to give security for consequential damages.

If the *nunciatus* proceed with his work after the *nunciatio*, though he may have a right to do that which is objected, still if he proceed in the face of the Prætor's interdict he will be compelled to desist, and to demolish the work, so imperative was the interdict, for Ulpian says: *Qui facit, etsi jus faciendi habuit, tamen contra edictum prætoris facere videtur, et ideo hoc destruere cogitur*¹. The words of the edict are imperative, *quod factum est restituat*². And so matters must remain until the *nunciatus* shewed that the *nuncians* had no right to impede his *novum opus*. But if the *nunciatus* offered security to the *nuncians* for repairing any damage which might arise he could then proceed, and the Prætor protected him in the progress of his work, *quo minus illi in eo loco opus facere liceat vim fieri veto*³.

This proceeding would arise between the proprietors of adjoining property where an injury would be occasioned to one by the acts done by the other on his own estate, and involved the principle *sic utere tuo ut alienum non lædas*. The security was given by stipulation; and if the *nunciatus* wished to proceed he must bind himself in a sufficient sum to meet the damage likely to accrue to the *nuncians*⁴.

*Damnum
infectum.*

*Damnum infectum est damnum nondum factum quod futurum veremur*⁵. This edict⁶ has in view damage not done, whereas all other actions, and especially those arising from the *Lex Aquilia*, regard only damage done. The case of the plaintiff was of that nature that it required the most prompt attention, and therefore the Prætor frequently delegated his authority in such matters to the municipal magistrates⁷.

¹ D. XXXIX. 1. 20. 1.

² *Id.* 20. pr.

³ D. XXXIX. 1. 20. 9.

⁴ *Id.* 21. 1.

⁵ D. XXXIX. 2. 2.

⁶ *Id.* 7.

⁷ *Id.* 1.

The edict *de damno infecto* had for its object the prevention of damage, where the building of any one was in such a ruinous condition that its fall was probable, and danger imminent thereby to the adjoining property; the owner of such ruinous structure might be compelled to remove the cause of danger, or to give security to cover any loss that might occur in the mean time.

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X.

Every one who had just ground for fear of damage from his neighbour's buildings, might claim security against the owner, but he must take the oath of calumny. The owner was the person primarily liable; should he be absent, notice should be given to his agent or his tenant¹. Should the owner be unknown, and the building be untenanted, Ulpian advises that a written notice should be fixed up, which may induce some one to come forward on behalf of the proprietor². The *cautio* when given must fully indemnify whatever damage may occur.

If the owner, or tenant, refused to give security, the complainant was *missus in possessionem*, put into possession, jointly with the defendant³. If this did not bring him to terms, a second application was made to the Prætor, which enabled the complainant to turn him out, and take sole possession, and so he might ultimately acquire the property by prescription⁴.

*Immissio
ex primo et
secundo
decreto.*

¹ *D. xxxix. 2. 45.*

² *Id. 4. 6.*

³ *D. xxxix. 2. 15, 16.*

⁴ *Id. 15, 23, and 33.*

CHAPTER XI.

Public Judgments.

BOOK
IV.

*Difference
between
publica
and pri-
vata de-
licta.*

CONCERNING public prosecutions, Justinian has treated very briefly in his *Institutes*, and Gaius is altogether silent upon the subject; nor will it be worth while to do more here than to notice the difference in the proceedings between them and the *privata delicta*, which have already been considered. In the latter we have seen that they involved the penalty of indemnification as between the delinquent and the injured party, who alone could appear as a prosecutor, whereas in the *Publica delicta*, since they had regard not to mere private interests, but to those of the community at large, any citizen might prosecute who did not labour under civil disability. *Publica judicia neque per actiones ordinantur, nec omnino quicquam simile habent ceteris judiciis de quibus locuti sumus, magnaue diversitas est eorum et in instituendis et in exercendis. Publica autem dicta sunt, quod cuivis ex populo executio eorum plerumque datur*¹.

*Extraordi-
naria ju-
dicia.*

A distinction was also drawn between *publica* and *extraordinaria judicia*, the former being based upon specific laws awarding definite punishments, the latter were prosecutions for crimes concerning which the laws were altogether silent, or where the punishment awarded by the law was not considered sufficiently severe to meet the justice of the case.

*Origin and
progress of
publica
judicia.*

The *publica judicia* were conducted before the Prætor, the *extraordinaria* before the consuls². The following appears to have been the origin and progress of the *publica judicia*. In the earliest period the kings are understood to have adminis-

¹ D. IV. 18. pr.

² Hein. Ant. IV. 18. 2.

tered justice, *omnia manu a regibus gubernabantur*¹. CHAP.
XI.
Tullus Hostilius established the *Duumviri perduellionis* for the trial of crimes, and allowed an appeal from their sentence to the people². This authority of the kings passed to the consuls, but from their decision there was an appeal to the *populus: lege lata factum est ut ab eis provocatio esset, neve possent in caput civis Romani animadvertere injussu populi*³.

This was the *Lex Valeria*, passed by *Valerius Publicola*, A.U.C. 245, which transferred the power of capital punishment to the *Comitia*, where it remained till the latest period of the Commonwealth. It would seem that in consequence of this law the *Quæstores parricidii* were appointed, *Quæstores
parricidii.* whose duty it was to bring all charges of capital offences before the *Comitia* for trial. The power of the magistrates was further restrained by the *Lex Aternia Tarpeia*, passed A.U.C. 300, which limited the highest fine to two cows and thirty sheep⁴.

In the year U.C. 464, the *Triumviri capitales* *Triumviri
capitales.* were appointed, who had the superintendence of the prisons, of whom Pomponius says, *ut cum animadverti oporteret interventu eorum fieret*⁵; whence the power of punishment was vested in them.

In process of time the proceedings in criminal cases began to assume a more fixed and permanent form; and in the year U.C. 605, the *Lex Calpurnia* *Lex Cal-
purnia.* was passed⁶ *de repetundis*, for restraining the exactions of public officers, and provided that all cases arising upon it should be tried by one of the *Prætores*; thus making it a *quæstio perpetua*. Afterwards *Cornelius Sulla*, A.U.C. 673⁷, made *peculation* and bribery also *quæstiones perpetuæ*, *Quæstiones
perpetuæ.* to which were subsequently added the *Crimen de falso, de*

¹ D. I. 2. 2. 2.² Liv. I. 26.³ D. I. 2. 2. 16.⁴ Haub. II. 33.⁵ D. II. 2. 2. 30.⁶ Haub. II. 39.⁷ Haub. II. 41.

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IV.

parricidio, and *de sicariis*; and four Prætors were created to administer justice in these cases¹. It appears that at the beginning of their year of office the Prætors decided by lot which question each should try².

Quæsitores.

These Quæsitores sat in the Forum *in tribunali*, having a sword placed before them as the emblem of their authority; and were assisted by the *Judex quæstionis*, and the *judices selecti*. These were chosen from the *Album Judicium*, of which we have before spoken³.

Judex quæstionis and judices selecti.

Their duties.

The Prætor as Quæsitör granted, or refused permission to prosecute, and summoned and discharged the jury; but the *Judex Quæstionis* tried the case⁴: and thus it appears that in the *publica judicia*, as in the *privata*, the matter was first *in jure* before the Quæsitör, and afterwards *in judicio* before the *judices*; the chief difference being that the *Judex* in the *privata judicia* sat alone, whereas in the *publica judicia* he presided over the *judices selecti*, examined the witnesses, ruled the evidence, and returned the verdict, which was determined by the majority.

The *judices* sat *in subselliis*, and were annually selected by the Prætor from those classes, from which the law from time to time ordained that they should be taken.

The proceedings began, as in the *privata judicia*, by *In jus vocatio*⁵. The accuser being *in jure* before the Quæsitör asked leave *nomen deferre*, to lodge the accusation, which might be done in the absence of the accused. But a counter accusation might be set up by the accused against the accuser, and then the accusation of the greater crime was first heard⁶. A day was appointed for the *delatio nominis*, when both parties being present the accuser took the oath of calumny, and made

Nominis delatio.

¹ D. I. 2. 2. 32.

² *Ante*, p. 250.

³ D. XLVIII. 2. 8.

⁴ Hein. *Ant.* IV. 18. 13.

⁵ Hein. *Ant.* IV. 18. 15.

⁶ C. IX. 1. 1.

his accusation. If the accused admitted the charge there was an end of the proceedings. If he pleaded not guilty, the accuser must accurately set forth in a *libellus*¹ the name of the accused, the charge against him, together with the place and time where and when the act was committed, and which he must sign; if he could not write, another might sign it for him²: a proceeding very similar to the indictment of the English law.

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*Libellus or
Indictment.*

The accuser was then said *deferre*, and the Prætor *recipere nomen*. The Prætor then appointed a day for the trial which was usually 30 days after, which time, if sufficient reason were shewn, might be enlarged.

*Nominis
receptio.*

The accused now standing indicted set about his defence: he put on his old clothes, *vestis sortida et obsoleta*, and let his hair and beard grow³.

On the day fixed for the trial both parties were called in Court by the *Præco*. If the *reus* did not appear, sentence of banishment was pronounced against him; if he were present and the prosecutor did not appear, the accusation fell to the ground⁴.

*Summoning the
parties.*

Both parties being in Court the next step was to summon the jury; the number of the jury depending on the law upon which the accused was arraigned. This was done by lot. The Prætor or the *judex quæstionis* put the names of all who were on the *album* for that year into an urn, and drew out the number required by law. The prosecutor and the accused had the right of rejecting such as they might consider likely to act with partiality, and others were then drawn till the required number was complete. The *judices* were not always chosen by lot, but the prosecutor selected 100 from the *Album*, of whom the accused might strike out 50; and thus they were said *edere judices*⁵.

*Balloting
the jury.*

Challenges.

¹ D. XLVIII. 2. 3. pr.

² Id. 3. 2.

³ Liv. VI. 20.

⁴ Hein. Ant. IV. 18. 22.

⁵ Id. 23.

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IV.Jury
sworn.

The jury being complete, they were sworn upon the laws to give an honest and true verdict; and all signed their names, lest in so large a number some one might be corruptly substituted for sinister purposes¹.

The trial now began, which consisted of the *prima* and *secunda actio*, unless the law on which the party was prosecuted declared there should be no *comperendinatio*, or adjournment.

The trial.

The prosecutor commenced. He stated his case, enumerating and commenting upon the facts and circumstances which it involved, and then proceeded to call his witnesses, and produce such documents (*tabulæ*) as proved the case². The competency of the witnesses was carefully ascertained, and they were closely examined as to any bias they might have on either side³: nor could near relations be compelled to give evidence against the accused⁴. The documentary evidence consisted of books of account, letters, notes of hand (*syngrapha*), &c.

Defence of
the Reus.

The evidence for the prosecution being closed, the advocates of the *reus* began the defence, which they did by denying or extenuating, or altogether justifying the ground of accusation; and by impeaching the evidence of the prosecutor: they also called witnesses (*laudatores*) to shew the character of the accused was above reproach⁵. Having finished their speeches, and exhausted their evidence, if there were no adjournment, the Prætor delivered three *tabellæ*, tablets, marked respectively A. C. NL. to each of the *judices*, who were thereupon *missi in consilium*, sent to consider their verdict.

Verdict of
of the jury.

In slight offences the *Judices* stood up and gave their verdict orally; but in the *graviora delicta* they deposited that tablet in the urn which signified the verdict of each *judex*, and accordingly

¹ *Id.*² Hein. *Ant.* IV. 18. 24.³ *D.* XXII. 5. 3.⁴ *Id.* 4.⁵ Hein. *Ant.* IV. 18. 28. and 29.

was A. *absolvo*, or C. *condemno*, or NL. *non liquet*, is not proved, or the "not proven" of the Scotch law; and which at Rome was no verdict at all. The tablets having been sorted and counted, the Prætor pronounced the verdict, which was either *non videtur fecisse*, an acquittal; or *videtur fecisse*, a conviction; or *amplius cognoscendum*. If this last verdict were given, a day was fixed by the Prætor, when the whole case was reheard; and this would be repeated till the *judices* came to a verdict of guilty or not guilty¹.

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As to the different *publica judicia*, the reader may consult the *Institutes*, Book IV, Title 18, and the *Digest*, Book XLVIII.

The *judicia populi*, or *extraordinaria judicia*, *Judicia populi.* were those questions which were decided by the *populus*, either because the law had prescribed no punishment; or on account of the peculiarity of the case, as that of Publius Horatius for the murder of his sister; or where the question involved the caput of a citizen, the 12 Tables directed that it should be tried in the Comitia: *de capite civis nisi per maximum comitium, ne ferunto*². But the *crimen læsæ majestatis*, i.e. whatever was prejudicial to the security and dignity of the Roman people³, and also the *crimen peculatus*, were *judicia populi*. *What.*

These *judicia* might be instituted in the *comitia centuriata*, and *tributa*⁴. None but a private person could be arraigned, and therefore if a Consul, Prætor, or any other in authority were to be accused, it was necessary to wait till his year of office had expired⁵.

The *accusatio* was commenced by the *Diei Diei dictio*. *dictio.* A magistrate ascended the rostrum and publicly declared that on a certain day he would accuse the person named of the crime in question, ordering the *reus* to appear on the said day, who

¹ Hein. IV. 18. 31. 32. 33.

² Tab. IX. fr. 2.

³ D. XLVIII. 4. 1. 1.

⁴ Hein. Ant. IV. 18. 35. 36.

⁵ Id. 37.

BOOK IV. must give security for his appearance, or in the mean time was committed to prison.

Accusa-
tion, form
of.

On the day fixed the magistrate again ascended the rostrum, when the *reus* was summoned by the *Præco*; and if he appeared, the accusation was duly made in this form: *Quando igitur hæc, et illa, quæ dixi, fecisti, ob eas res ego mulctam tibi hanc dico, vel pecuniam hanc, sive perduellionem tibi judico*¹. This was done three times, *intermissis diebus*, with an interval of some days.

Promul-
gatio.

After the third time the accusing magistrate wrote and published the crime, and proposed punishment. This *promulgatio* was fixed up in the forum *per tres nundinas*, for the information of the people, as in the case of passing a *Lex*².

Defence of
the Reus.

On the *tertiæ nundinæ* the prosecutor ascended the rostrum, and stated his accusation for the fourth time, when the *reus* made his defence; after which another adjournment took place, a day being fixed for taking the votes in the *comitia*³: and in the interval, it would seem, that everything was resorted to, to secure the acquittal of the accused: bribery of the Augurs; tampering with the prosecutor; and the most abject humiliation before the *populus* to excite their commiseration⁴.

Voting in
the Comitia.

The day appointed for voting in the *comitia* having arrived, the magistrate made the *rogatio* to the *Populus*, or the *Plebs*, as the case might be; each voter was furnished with two tablets marked UR. and A.; they passed over the *pontes* into the *septa*, delivering *in transitu* which vote they chose to the *custodes*. The votes were then sorted and counted, and the accused was convicted or acquitted according as UR. or A. prevailed.

If the reader wish to investigate this subject more in detail, he may consult Heineccius, Book IV. Title 18⁵.

¹ Hein. *Ant.* IV. 18. 40.

² *Ante*, Book I. ch. 2.

³ Hein. *Ant.* IV. 18. 42.

⁴ *Id.* 43.

⁵ Last Edition by Muhlenbruch.

CHRONOLOGICAL APPENDIX¹.

Some of the most distinguished Jurists are mentioned in the notes under the dates when they lived.

First Period.

A. U. C.	<i>Political Events.</i>	A. U. C.	<i>Legislation.</i>
1	Romulus, first King and Founder of the City.		
38	Interregnum.		
39	Numa Pompilius, second king.		
81	Tullus Hostilius, third king.		
113	Ancus Martius, fourth king.		
138	Tarquinius Priscus, fifth King. The number of the Senators increased to 300.		
176	Servius Tullius, sixth King. The Populus divided into classes and centuries. The Census instituted. The Comitia Centuriata established. The Plebs enrolled in Thirty Tribes.		
220	Tarquinius Superbus, seventh king.		Jus Papirianum.
244	The kings expelled.		
245	Two Consuls first created. An appeal to the people conceded.		
253	The first Dictator: with the Magister Equitum.		
260	Tribuni plebis and Ædiles plebis instituted.		Leges Sacratæ.
261	A Treaty with the Latins.		
263	First instance of the Comitia Tributa.		
		282	Lex Publilia.
		300	Lex Aternia.

Second Period.

303	Decemviri appointed.	Ten Tables perfected.
		304 Two other Tables added.
305	Authority of the Decemviri terminated, and two Consuls elected.	305 Laws of the Twelve Tables published.

¹ This is taken from Heubold's *Institutes*, Vol. II.

A.U.C.	Political Events.	A.U.C.	Legislation.
309	Renewed contentions between the Patricians and Plebeians.	309	Lex Canuleia concerning the Marriage of Patricians and Plebeians.
311	Censors instituted.		
364	Rome burned by the Gauls.		
387	The first Consul elected from the Plebs. The Prætor Urbanus, and two Curule Ædiles established.	387	Commencement of the Edicta of the Prætor and Ædiles.
416	Latium subdued.		
		428	Lex Petillia Papiria de nexu ob rem alienum.
		450	Jus Flavianum.
488	Italy subdued. The Prætor Peregrinus appointed.	469	Lex Hortensia de Plebiscitis.
490	First Punic War.	488	Commencement of the edict of the Prætor Peregrinus.
508	The Prætor Peregrinus established.	491	Lex Silia de conditione pecuniæ certæ.
		510	Lex Calpurnia de conditione alius rei certæ præter pecuniam.
513	Sicily first made a Province. The number of the Tribes increased to 35. Centumvirale iudicium established. Triumviri Capiteles created.	513	Lex Æbutia abolishing the Legis Actiones.
527	Four Prætors created. Two of these to preside in Sicily and Sardinia.		
536	Second Punic War.	536	Commencement of the Edicts of the provincial Prætor.
545	Eighteen Colonies which had continued faithful to the state had the <i>jus Latii</i> conferred upon them; whence the commencement of the Colonie Latine ¹ .		
554	First Macedonian War.	550	Lex Cincia de donis et muneribus.
557	Six Prætors created; two of them located in Spain.	552	Jus Ælianum.
		557	Lex Atinia, preventing the usucapion of <i>res furtivæ</i> . Lex Atilia de dandis tutoribus in urbe.
		568	Scutum de Bacchanalibus. Lex Platoria de minoribus XXV. annis.

¹ Liv. xxvii. 2. 10.

A.U.C.	<i>Political Events.</i>	A.U.C.	<i>Legislation.</i>
582	Second Macedonian War.	571	Lex Furia testamentaria.
604	Third Punic War.	585	Lex Voconia testamentaria.
605	Third Macedonian War. Commencement of the <i>Quæstiones perpetuæ</i> . The first <i>quæstio</i> being <i>de repetundis</i> .	605	Lex Calpurnia Repetundarum. Lex Rammia de Calumniatoribus.
608	Carthage and Corinth taken, and razed.		
621	Sedition of T. S. Gracchus. Lex agraria.		
632	Sedition of C. S. Gracchus. Judicia transferred from the Senate to the Equites.	632	Lex Sempronia Judiciaria.
635	The <i>Quæstio</i> concerning ambitus and peculatus established.	635	Lex Maria de ambitu.
648	Judicia submitted to the Senate.	647	Lex Thoria agraria.
652	<i>Quæstiones de vi et majestate</i> established.	648	The first Lex Servilia.
654	Judicia again transferred to the Equites only.	652	Lex Luctatia de vi. Lex Appuleia majestatis. Lex Appuleia de Sponsu.
659	<i>Quæstio de Civitate</i> .	654	The second Lex Servilia judiciaria. And the Lex Servilia repetundarum, by C. Servilius Glaucia, Prætor.
663	Judicia submitted to the Senate and Equites. Social War with the Marsi.	659	Lex Licinia Mucia de Civitate ¹ . Lex Furia de Sponsu. Lex Publilia de Sponsu.
664	Citizenship conceded to the Latins.	663	Lex Livia Judiciaria.
665	Citizenship conceded to the Italian States. <i>Quæstio de plagis</i> .	664	Lex Julia de Civitate Sociorum.
667	Commencement of the Civil Wars. C. Marius, L. Cornelius Cinna, and Cornelius Sulla.	665	Lex Plautia de vi. Lex Plautia de Civitate. Lex Fabia.
672	L. Cornelius Sulla created perpetual Dictator.		
673	Sulla restores the Judicia to the Senate. The power of the Tribuni Plebis diminished. The <i>Quæstiones de sicariis, de veneficiis, parricidiis, incendio, and</i>	673	Leges Corneliæ judiciarie de sicariis et injuriis, de falsis. Lex Cornelia de Sponsoribus, et pecunia credita.

¹ Quintus Mucius Scævola, C. Ælius Gallus.

A.U.C.	<i>Political Events.</i>	A.U.C.	<i>Legislation.</i>
	de falsis established. The number of Prætors increased to eight.		
684	Pompey restores the power of the Tribuni Plebis. The Judicia shared equally by the Senate, the Equites, and the Tribuni Ærarii. The Decuriæ Judicum established.	684	Lex Aurelia judiciaria.
		685	Lex Hortensia de nundiniis.
		687	Lex Cornelia de Edictis Prætorum ¹ .
691	M. Tullius Cicero and C. Antonius, Consuls. The Ordo Equestris takes a middle rank between the Senate and the Plebs.		
694	Triumvirate of Crassus, Pompey, and Julius Cæsar.		
		695	Lex Julia (Julii Cæsaris) repetundarum.
		699	Lex Pompeia judiciaria. Lex Pompeia de parricidiis. Lex Rhodia de jactu.
705	Citizenship granted to the Gauls beyond the Po, and the whole of Cis-Alpine Gaul admitted to the jus civitatis.	705	Lex de Gallia Cis Alpina.
708	The Calendar reformed by Julius Cæsar. Ten Prætors created. The Tribuni Ærarii erased from the Decuria judicum.	708	Lex Julia judiciaria. Lex Julia de ære alieno.
709	Julius Cæsar made perpetual Dictator. The number of Prætors and Quæstors again increased.		
710	The Prætors now 16. Ædiles Cereales. Cæsar slain in the Senate-House. The perpetual Dictatorship abolished. The third Decuria judicum restored.	710	Lex Antonia judiciaria.
711	The Triumvirate of M. Antony, C. J. Cæsar Octavianus, and M. Æmilius Lepidus.		
		714	Lex Falcidia de Legatis.
		720	Lex Scribonia de Usucapione Servitutum.
722	The Civil War renewed between Cæsar Octavianus and Antony.		

¹ C. Aquilius Gallus.

A.U.C.	Political Events.	A.U.C.	Legislation.
723	Cæsar Octavianus won the battle of Actium, and assumed the name of Augustus.	723	¹ Lex Julia et Titia de tutoribus in provinciis a præsidibus dandis.

Third Period.

Commencement of the Empire.			
724	Egypt becomes a Province. The Juridicus Alexandriæ established.		
725	Augustus assumes the title of Emperor.		
727	Augustus made Emperor for ten years. At the termination of which period it was again renewed. A fourth decuria of judices (<i>Ducenariorum</i>) added. The Fiscus separated from the <i>Ærarium</i> .	727	The Lex Regia. Commencement of the <i>Constitutiones Imperatorum</i> . Augustus gave the <i>Auctoritas Respondendi</i> .
729	The Prefect of the City instituted.		
731	The authority of the Tribunes and Proconsuls vested in Augustus.	731	Lex Julia (Augusti) judiciaria.
735	<i>Consularis Potestas</i> decreed to Augustus in perpetuity.	735	Lex Mensia de natis ex alterutro peregrino.
		737	Lex Julia de Adulteriis. Lex Julia de maritandis ordinibus proposed and rejected.
741	Augustus made Pontifex Maximus.	743	Scia sex de aqueductibus.
		745	Lex Quinctia de aqueductibus.
747	The City of Rome divided into fourteen wards. Italy divided into eleven districts.		
748	Prefect of the Prætorian Guard first created.		
A.D.		A.D.	
		4	Lex Ælia Sentia de manumissionibus. Lex Julia de maritandis ordinibus, passed.
6	Prefect of the market and of the police appointed.	6	Lex Julia de vicesima hereditatum ² . Lex Julia de annonæ.
7	Prætors again increased to the number of sixteen.		

¹ P. Alfenus Varus.

² Antistius Labeo and Anteius Capito, and the Commencement of the two schools of Proculæans and Sabineans.

A.D.	<i>Political Events.</i>	A.D.	<i>Legislation.</i>
		8.	Lex Furia Caninia de manumissionibus.
		9.	Lex Julia et Papia Poppæa. Sctum de usufructu omnium rerum, quo introductus quasi usufructus.
		10.	Lex Junia Velleia testamentaria. Sctum Silianum, D. XXIX. 5. Lex Petronia de servis.
14	Tiberius. The Comitia for electing magistrates transferred from the Populus to the Senata.	14	Responsorum signatorum origo ¹ .
		16	Sctum Libonianum de falso.
		19	Lex Junia Norbana ² .
		24	Lex Visellia de juribus Libertinorum. The passing of laws becomes less frequent. The authority of the Seta increasing in proportion.
		27	Sctum Licinianum de falsis ³ .
		34	Sctum Persicianum ad legem Papiam Poppæam.
37	Caligula. A fifth Decuria of judges added.		
41	Claudius.		
		42	Sctum Largianum de successione in bona Latinorum Junianorum.
44	The management of the <i>Ærarium</i> again transferred to the <i>Quæstors</i> ; the <i>Prætores Ærarii</i> being abolished. Two <i>Prætores Fidei Commissarii</i> instituted.	44	Sctum Claudianum de tutela mulierum legitima.
		46	Sctum Velleianum de intercessionibus mulierum. Sctum de adsignandis libertis.
		47	Sctum Claudianum ad Legem Cinciam. Sctum Macedonianum de mutuo filiorum familias.
		49	Sctum Claudianum, concerning the marriage of an uncle and niece.
		52	Sctum Claudianum, concerning

¹ Massurius Sabinus.² M. Cocceius Nerva Pater.³ Sempronius Proculus and Cassius Longinus.

A.D.	<i>Political Events.</i>	A.D.	<i>Legislation.</i>
			the cohabitation of free women with slaves.
			Sctum Claudianum, concerning those who procured themselves to be sold for the purpose of sharing in the price.
54	Nero.		
		55	Sctum Neronianum ad Legem Cinciam.
		56	Sctum Volusiana tria. (1) De ædificiis negotiationis causa diruendis. (2) De pignorum captione. (3) Ad Legem Juliam de vi privata.
		57	Sctum Pisonianum ad Sctum Silanianum.
		60	Sctum Neronianum de provocatione ad senatum facta.
		61	Sctum Turpillianum de tergiversationibus, prævaricationibus, &c. Sctum Calvisianum ad Legem Papiam Poppeam.
		62	Sctum Trebellianum de Fidei commissis hereditatibus.
		63	Sctum Memmianum de simulatis adoptionibus.
64	The greater part of the City of Rome consumed by fire.		
68	Galba.		
69	Otho. Vitellius.		
70	Vespasianus.	70	Sctum de imperio Vespasiani ¹ .
74	The last Lustrum celebrated.	74	Sctum Pegasianum de fidei commissis hereditatibus: ad Legem Papiam Poppeam, et ad Legem Æliam Sentiam.
		76	Sctum Plantianum de fidei commissis tacitis ² . Sctum Plancianum, or Plantianum de subjiciendo agnoscendoque partu.
79	Titus. One of the Fidei commissary Prætors suppressed.	79	Sctum né quis ob idem crimen pluribus legibus reus fieret. Edictum—de testamento militari.
81	Domitianus.		

¹ M. Cælius Sabinus, S.

² Pegasus, P.

A.D.	<i>Political Events.</i>	A.D.	<i>Legislation.</i>
		84	Sctum Junianum de collusionibus in causis liberalibus.
96	Nerva. The Prætor Fiscalis instituted.		
98	Trajan.		
		101	Sctæ de fidei commissis libertatibus ¹ . Sctum ad Legem Cinciam.
114	Trajan styled <i>Optimus</i> by the Senate.	114	Sctum de actione adversus magistratus. Sctæ plane incertæ ætatis de causæ probatione quæ errorem respicit; de captatoris institutionibus et legatis.
117	Hadrian. The boundaries of the Empire contracted.		
119	Italy divided into four provinces, and governors assigned to each. The imperial, military, and civil officers reduced to that state in which they remained till the time of Constantine the Great.	119	Constitutiones Principum adhibito in consilium consistorio condi ceptæ.
120	Hadrian commenced his journeys.		
		122	Sctum Acilianum de ædificiis negotiationis causa non diruendis.
		123	Sctum Apronianum de hereditatibus per fidei-commissum civitatibus relictis ² .
127	The <i>Advocatus Fisci</i> first created.		
		129	Sctum Inventianum de accessionibus fructibusque hereditariis. Epistola Divi Hadriani, granting the <i>beneficium divisionis</i> to sureties.
		131	The Edictum Perpetuum Salvii Juliani, ordered by Hadrian ³ . Edictum de scripto herede statim in possessionem mittendo. Sctæ varia: de manumissionibus: de jure natum e parentibus diversæ conditionis: de partu agnoscendo: de usucapione pro herede revocanda: de lega-

¹ P. Juventius Celsus, filius. Neratius Priscus, P. Priscus Juvolenus, S. Sextus Pedius, &

² Aburnus Valens, S.

³ Salvius Julianus, S. Sex. Cæcilius Africanus. Terentius Clemens.

A.D.	<i>Political Events.</i>	A.D.	<i>Legislation.</i>
			tis civitatibus relictis. Hadrian ordains that where the <i>responsa prudentum</i> agreed they should be considered as law: where they differed, a discretion was left to the judex. Constitutio de thesauris.
131	Antoninus Pius.		
		158	Sctum Tertullianum de successione matris ¹ . Constituciones: de adrogatione impuberum: de donationibus: de legatis pœnœ nomine relictis: de lege Falcidia ad hereditates legitimas accommodanda.
161	Marcus Aurelius Antoninus et L. Verus.	161	Sctum Sabinianum de adoptionibus ex tribus maribus. Sctum de satisfactione tutorum ex inquisitione datorum ² .
169	MARCUS AURELIUS ANTONINUS—solus.	169	Rescripta Divorum Fratrum Collecta a Papirio Justo ³ . Scta de hypotheca tacita ejus qui quid ad reficiendas sedes credidisset: de alimentis testamento relictis: de questione status. CC. de cura minorum: de imperfecta cretione: de bonorum additione libertatum conservandarum causa: de exceptione compensationis: de litis denunciatione. Decretum Divi Marci.
176	M. Aurelius Antoninus et Commodus.		
		178	Sctum Orficianum de successione liberorum in bona materna. Scta de nuptiis Senatorum ad legem Juliam et Papiam Poppœam: de

¹ Junius Mauricianus. Sex. Pomponius. L. V. Mæcianus.

² Claudius Saturninus.

³ Tarutenus Paternus. Papirius Justus. Q. C. Sœvola. Ulpius Marcellus. Gaius.

A.D.	Political Events.	A.D.	Legislation.
		334	CC. de testamento militari: de legitimatione per subsequens matrimonium.
335	Constantine divides the Empire among his three sons.		
337	Constantine dies, having been baptized.		
337	Constantinus II., Constantius and Constans.	337	C. de cretione.
340	Constans and Constantius.		
342	Constantius abolishes the <i>formula</i> with respect to actions.		
350	Constantius and Magnentius.		
353	Constantius,—solus.		
354	The Prætor Constantianus first created.		
		355	C. de revocandis donationibus patronorum.
360	The Prefect of Constantinople first instituted.		
361	Julian the Apostate.	361	CC. de querela inofficiosi testamenti et inofficiosæ donationis.
362	Persecution of the Christians.		
363	Jovianus. The Christians again protected.		
364	Here the Empire divides. Valens, East. Valentinianus I. Gratianus and Valentinianus II., in the West.		
		365	C. qua barbarorum conjugis interdictum. Codex Hermogenianus.
		374	C. qua jus vitæ et necis patribus ademptum.
379	Theodosius I., West.		
381	Council of Constantinople.	380	CC. varæ de secundis nuptiis.
		382	C. de suppliciis in 30 diem differendis.
384	Arcadius, East.	384	C. qua vetitæ nuptiæ consobrinorum.
		390	C. de tutela materna.
392	Theodosius I., East and West.		
393	Honorius.		
395	Theodosius dies, having divided his Empire between his two sons. Arcadius, East; Honorius, West.		

A.D.	Political Events.	A.D.	Legislation.
		396	C. de incestis nuptiis.
		397	C. ad Legem Juliam Majestatis. De usu sermonis Græci in sententiis judicium.
		405	C. qua nuptiæ consobrinorum rursus permissæ.
		406	C. de litis denunciatione.
		407	C. qua cretio filiis familias remissæ.
408	Theodosius II., East.		
		410	C. qua leges decimaræ sublatae, et jus liberorum promiscue indultum.
		413	C. de testamento principioblati.
414	Kingdom of the Burgundians established.		
		418	C. qua testamenta lapsu decennii infirmantur.
419	Commencement of the kingdom of the Visigoths.		
		421	C. de damnis divortiorum.
423	Joannes Tyrannus, West.		
		424	C. de præscriptione 30 annorum adversus actiones.
425	Valentinianus III., West.		
		425	A school of Law established at Constantinople by Theodosius II., in which a study of five years was required in the <i>Institutes</i> of Gaius, the books of Ulpian <i>ad Edictum</i> and the <i>Libri Responsorum</i> of Papinian.
		426	C. de responsis prudentum. In which authority is given to the books of Papinian, Paulus, Gaius, Ulpian, and Modestinus only.
		428	C. qua impetratio actionis in omnibus judiciis remissa.
429	Origin of the kingdom of the Vandals in the West.		
431	Council of Ephesus.		
		438	Codex Theodosianus. Commencement of the Novels of Theodosius II.
		439	C. de nova testandi forma salvo in occidente testamento juris civilis.

A.D.	<i>Political Events.</i>	A.D.	<i>Legislation.</i>
		443	C. de legitimatione per oblationem curiæ.
		446	C. qua remissa bonorum possessionis petendæ necessitas.
449	Commencement of the Anglo-Saxons.	449	C. de causis divortiorum.
450	Marcianus, in the East.	450	C. de transmissione Theodosiana.
451	Council of Chalcedon.		
455	Petronius Maximus, in the West.		
457	Leo I., in the East. Majorianna.		
461	Severus,		
467	Anthemius,		
	} in the West.	468	Novellæ Post-Theodosianæ desinunt.
		469	CC. de forma stipulationum prætoriarum et judicialium de privilegio pignoris publici.
472	Olybrius,		
473	Glycerius,		
474	Julius Nepos,		
	Leo II., Zeno, in the East.		
475	Romulus Augustulus, in the West.		
476	The Empire of the West destroyed by Odoacer.	476	C. de legitimatione per subsequens matrimonium.
482	Justinian born.		
486	Commencement of the kingdom of the Franks.	486	CC. de testibus : de contractu emphyteuticario : de judiciorum ordine : de sublatiis penis plus petentium.
491	Anastasius.	491	C. de præscriptione 40 annorum.
493	The kingdom of the Ostrogoths established in Italy by Theodoric.		
		497	C. de matrimonio bona gratia dissolvendo.
		500	Edictum Theoderici. Regis Ostrogothorum.
		503	C. de emancipatione Anastasiana.
		506	Lex Romana Visigothorum, vulgo Breviarium Alaricianum, auspiciis Alarici II. Regis Visigothorum concinnata. C. de venditionibus actionum pro minori pretio factis.
518	Justinus.		

A.D.	<i>Political Events.</i>	A.D.	<i>Legislation.</i>
527	Justinus and Justinianus. Justinianus, solus. Theodora, the wife of Justinian, raised to the dignity of Empress.	521	C. de testamentis cæcorum.
		528	Feb. 13. Ten Commissioners appointed for compiling the Code.
		529	Ap. 7. A Constitution confirming and publishing the Codex Justinianus.
		530	Dec. 15. Seventeen Commissioners selected for compiling the Digest.
532	A great sedition at Constantinople.	533	Dec. 16. The Digest completed. Dec. 30. The Institutes and Digest declared to be law.
548	Theodora dies.	534	Nov. 16. The revised edition of the Code published.
551	Terrible Earthquake.	535	The Novels of Justinian commenced.
565	Justinian dies.		
867	Basilus Macedo.	887	The first edition of the <i>Basilica</i> commenced by Basilus Macedo, in 40 books, completed by Leo the Wise, in 60 books.
1453	Constantinople taken by the Turks.		

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